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Smith & Smith - Smith for D. C.

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No. 274

Supreme Court of the United States.

OCTOBER TERM, 1901, No. 274.

MOBILE TRANSPORTATION COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CITY OF MOBILE,

DEFENDANT IN ERROR.

Brief

FOR THE PLAINTIFF IN ERROR BY HARRY T. SMITH AND GREGORY L. SMITH.

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BRIEF FOR THE PLAINTIFF IN ERROR BY HARRY T. SMITH AND GREGORY L. SMITH.

The action was ejectment brought by the defendant in error against the plaintiff in error, to recover a portion of the shore and bed of the Mobile river, situate in the City of Mobile, Alabama, between the high water mark and the channel line or point of practical navigability as established by the Mobile River Commission.

QUESTIONS PRESENTED.

First. The defendant in error, who was the plaintiff in the trial court and the appellee in the Supreme Court of Alabama, claimed, and both the trial court and the Supreme Court of Alabama held: (a) That the shore and bed of Mobile River, which is a navigable stream in which the tide ebbs and flows, passed out of the United States and into the State of Alabama by virtue of the compact under which the State of Alabama was admitted into the Union in 1819, and that this title passed from the State

of Alabama to the City of Mobile by virtue of the acts of the Legislature of that State, which were in words and figures as fol'ows:

"An Act Granting the City of Mobile the Riparian Rights in the River Front.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened, That the shore and the soil under Mobile River, situated within the boundary lines of the City of Mobile, as defined and set forth in section two of 'An act to incorporate the City of Mobile,' approved February 2d, 1866 be and the same is hereby granted and delivered to the City of Mobile.

"Sec. 2. Be it further enacted, That the mayor, aldermen and common council of the City of Mobile be and are hereby created and declared trustees to hold, possess, direct, control and manage the shore and soil herein granted, in such manner as they may deem best for the public good.

"Approved, January 31, 1867."

"An Act to amend an Act entitled "An Act to fix the right of the City of Mobile to certain real estate." Approved February 18th, 1895.

"Sec. 1. Be it enacted by the General Assembly of Alabama, That an Act entitled 'An Act to fix the right of the City of Mobile to certain real estate,' approved February 18th, 1895, be, and the same is hereby amended so as to read as follows:

"Sec. 1. Be it enacted by the General Assembly of Alabama, That the absolute and unconditional title and right to all real estate, rights and easements, pertaining or incidental, to any real estate, of any right therein, or thereto, heretofore vested in the mayor, aldermen and common council of the City of Mobile or in the Port of Mobile, or in the present City of Mobile, or in any municipal corporation of Mobile, however said corporation may have been named or called, whether held in trust or otherwise, except such as have heretofore vested in the trustee for the holders of the bonds of the City of Mobile, is hereby vested absolutely, and unconditionally in the City of Mobile, to be by it held, managed, controlled and disposed of as to it may seem best.

"Sec. 2. Be it further enacted, That the said City of Mobile be, and is hereby authorized and empowered to contract and arrange with such person or persons as it may think proper upon such terms as may seem best to it, for the ascertainment, location and recovery of any part of the whole, of such property and the rights hereby vested in it and may if it thinks proper to do so, convey to such person or persons an interest in said property,

and rights, as compensation for his or their services in such matters.

"Approved, December 5th, 1896."

The defendant in error also claimed, and the trial court and the Supreme Court of Alabama also held:

(b) That the title to these lands, having passed out of the United States and into the State in 1819, no title could be obtained by the plaintiff in error, or those under whom it claims, by virtue of the patent which the United States' Government *subsequently* issued to Poe, Robertson and McCloskey; (record page 47); (c) That any incomplete, Spanish grant, would have required confirmation on the part of the United States in order to give it validity, and that such confirmations operate only from the date of the patent issued on account thereof, and that therefore, all evidence as to the report of an incomplete Spanish grant, and of a patent issued in 1836 and all deeds from the patentees down to the plaintiff in error, were irrelevant and immaterial, since they began with a grant from the United States' Government subsequent to the time that it had parted with its title.

We note, in passing, also that there was no proof of the existence of a Spanish grant, the only evidence offered being the report of Commissioner Crawford. This established that the commissioner made the report, but it did not establish the truth of any fact stated in the report, nor did the report set forth the existence of such a grant.

> Richard J. Watkins vs. The Lessees of Oliver Holman, 16 Pet., page 25.

These deeds were inadmissable for several other reasons, including the fact that they did not convey, or purport to convey, the lands which are the subject matter of the litigation, but we shall hereafter speak of the case as if these objections did not exist.

(d) The defendant in error claimed, and the trial court and the Supreme Court of Alabama held, that a patent from the

United States to land bounded by the tide waters of Alabama confers no title below high water mark, and that, therefore, the plaintiff in error would have taken no title below the high water mark, even had the patent been issued prior to the grant of the land to the State.

The questions above indicated arose upon the introduction in evidence by the defendant in error of the statutes constituting the compact under which Alabama became a member of the Union and two acts of the General Assembly of Alabama, above quoted, and by the plaintiff in error offering in evidence, and the court excluding from the jury, a long list of conveyances purporting to pass the title from the United States' Government in in 1836 down to the defendant in error, the patent in question and all of the early conveyances describing the land as bounded by the tidal stream. The court excluded these conveyances from the evidence, and gave the general affirmative charge in favor of the defendant in error. These rulings were assigned for error in the Supreme Court of Alabama, and are now understood by the defendant in error to constitute the basis of the following assignments of error in this court, viz: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 36, 37, 52, 54, 55, 56, 57, and 58.

Second. (a) The defendant in error claimed and the trial court and the Supreme Court of Alabama held, that the owner of the upland upon a tidal stream had no right of wharfage unless as a license from the state, (b) that in Alabama no such license has ever been granted; (c) and that even where it is granted by the State, it is revocable, and that it would have been revoked in this instance by the grant to the City of Mobile in 1867.

The plaintiff in error contends, as we understand, (1) that such a license was granted by the State; (2) that the license was acted upon before its revocation; (3) that when such a license is executed it becomes irrevocable or in other words that it has acquired this right by estoppel, both in the building of

improvements and in the payment of taxes; (4) that it has acquired title or at least the right of possession by adverse possession.

These several questions indicated in this paragraph are supposed by the plaintiff in error to have been presented by the rulings of the trial court in excluding the evidence which it offered, tending to show the driving of some piles in front of the land and the erection of some improvements upon the upland bounded thereby, at some date not shown by the evidence offered, or by any statement of counsel; and also by the exclusion of the evidence offered by the plaintiff in error tending to show that it had paid certain municipal taxes upon the land to the defendant in error. These questions are sought to be brought before this court, as we understand, by the following assignments of error, that is to say: 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 35, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, and 53.

Third. The plaintiff in error likewise contends (a) that ejectment is not the proper remedy, (assignments of error 1 to 5) and (b) that the City of Mobile was dissolved and abolished and no longer exists, and that the lands of the City reverted to the State.

We do not think that the question last indicated has ever been presented, but it is attempted to raise it by the ninth assignment of error. The statute therein referred to constituting, as it does, a new charter for the City of Mobile is too long to be here inserted. It constitutes, however, nothing more, nor less than, an amendment to the charter of the defendant in error, which is a municipal corporation.

The ingenuity of counsel will doubtless bring forward other contentions on behalf of the plaintiff in error, but the above constitutes a list of such as the writer has heard, or is able to discover from the record. Amongst them, there appears to the writer to be but three federal questions, and those so old and so often thrashed over by this court, that their discussion upon

principle, is no longer interesting or profitable, namely, (1) did the State of Alabama obtain the title to the shore and bed of the Mobile river, which is a nazigable stream where the tide ebbs and flows, by virtue of the compact under which it became a member of the Union? (2) What title did the subsequent patentee of the United States acquire? (3) Could the State convey its title to the City?

The questions as to the riparian rights of the upland owner whether that of wharfage, accretions, or what not, acquired from the State, whether by grant, license or estoppel, are not believed to be federal in their nature, so long as they do not interfere with interstate commerce, notwithstanding the fact that they have been frequently discussed in this court upon writs of error from the State courts of final resort.

We are not unaware of the decisions of this court to the effect that it will not review the decisions of the State courts of final resort, even upon federal questions which are not necessarily involved in the decision of the State court, and that the construction and application of State statutes by the State courts do not present federal questions; nor have we overlooked the fact that most, if not all, of the contensions of the plaintiff in error to which we have undertaken to reply fall under the ban of these decisions. We shall discuss them, however, not only from the consciousness that we may be in error as to such jurisdictional questions, but because we would waive all jurisdictional questions, if jurisdictional questions could be waived, and have every question attempted to be raised fully decided by this court, their decision being necessary or at least desirable on account of similar litigations now pending in the lower federal courts.

From this, however, we except the question of adverse possession, because, as will appear, the contention of the plaintiff in error is based upon nothing which is really in the case.

ARGUMENT.

No Spanish Grant.

It is not denied that if the Spanish Government had owned and granted these lands to the plaintiff in error or its grantors while it held the title to the land, this grant would have been valid and conclusive. To have this effect, however, the grant must have been complete. But in this case Spain did not own the land and there was no Spanish grant and if there had been the evidence offered would not have been competent to prove it. This evidence was nothing more nor less than a report by a government commissioner to the effect that Bernoudy *claimed* to hold such a grant in an imperfect and incomplete condition. The report does not even identify the land in question as a part of the alleged incomplete grant.

There was no proof of the existence of a Spanish grant, the only evidence offered being the report of Commissioner Crawford. This established that the commissioner made the report, but it did not establish the truth of any fact stated in the report, nor did the report set forth the existence of such a grant.

> Richard J. Watkins vs. The Lessees of Oliver Holman, 16 Pet., page 25.

That, however, such an alleged grant does not in any manner or to any extent, strengthen the title of the patentee is too well settled by authority to need further comment upon principle.

"Undoutedly congress might have granted this land to the patentee or confirmed his Spanish grant before Alabama became a State. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States, over the place in question after Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty or dominion over it had become vested in the State."

> Goodtitle vs. Kibbe, 9 How., 478.
> Shively vs. Bowlby, 152 U. S., 28.

The plaintiff in error's alleged title is founded upon the report of the commissioner and act of Congress confirmatory thereof, and not upon any Spanish grant.

Doe (Chastang) vs. Dill, 19 Ala., 421.
Hall vs. Root, 19 Ala., 378.
Menard's Heirs vs. Massey, 8 Howard, 308.
Chastang vs. Armstrong, 20 Ala., 609.

A confirmation act, passed by Congress in 1836, does not reach back to the original concession, and exclude grants of the same land made in the intermediate time, either by Congress itself or a board of commissioners or the District Court, acting under its authority.

LesBois vs. Bramell, 4 How., 449.

The treaty of 1819 with Spain confirms by its own language all grants of Spain theretofore made of lands in the territory which confessedly belonged to Spain, that is, east of the Perdido river. As to lands west of that river, the treaty does not operate, for the United States has always resisted Spain's claim and the treaty itself declares that Spain's claim was not valid.

Garcia vs. Lee, 12 Peters, 511.
Pollard vs. Files, 2 How., 602.

When a party has a complete title under the Spanish grant no confirmation by the United States can add any strength to the title.

Doe vs. Eslava, 9 How., 445.

Perfect titles made by Spain before January 24th, 1818, are intrinsically valid and *exempt* from the provision of the treaty between Spain and the United States ceding Florida; and they need no sanction from the legislature or judicial departments of this country.

U. S. vs. Wiggins, 14 Peters, 350.

We might add, however, that a Spanish grant, even if perfect and conveying lands owned by the government on a tidal stream by which the grant is bounded, passes no title below the high water line.

Did the title to the land pass from the United States to the State at the time of its admission into the Union? Did a patent issued subsequent thereto in confirmation of an incomplete Spanish grant, take precedence over the title of the State? Does a patent from the United States subsequent to the admission of the State into the Union, conveying land bounded by a tidal stream extend the grant below high water mark? The discussion of these questions ends on page 24.

That the shores and beds of all navigable streams within the limits of the State, became the property of the State by virtue of the act of its admission into the Union, ought no longer to be questioned.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.
Hallett and Walker vs. Beebe, 13 Howard, 25.
Hoboken vs. Pa. R. R. Co., 124 U. S., 688.
Shively vs. Bowlby, 152 U. S , 55.
Water Power Co. vs. Water Commrs., 168 U. S., 357.

It is both interesting and important, if not entirely conclusive of this case, to note that prior to the issuance of the patent upon which the plaintiff in error relies, the Congress of the United States undertook by the act of May 26th, 1824, to convey these lands directly to the City of Mobile and that the City of Mobile brought suit for the recovery thereof against those who were then in possession, and that the city was defeated in these suits upon the simple ground that the United States Government had parted with the title to these lands in the year 1819, by virtue of the compact under which the State of Alabama was admitted into the union, and that the title was therefore in the State and could not therefore be conveyed by the United States Government. The validity of the act of Congress in other respects was in no manner questioned; the power of the government to convey such lands when it possessed the title thereto was not doubted; but both the Supreme Court of Alabama and the Supreme Court of the United States explicitly decided that the city could not obtain a title from the United States Government in 1824 to land which the government had conveyed to the State in 1819, and

yet it is now contended that the United States Government could and did convey the title to these lands to those under whom the plaintiff in error claims, *in the year* 1836. It was because the United States Government had undertaken to convey these lands to the City of Mobile, and because it had been held by the Supreme court of Alabama in the City of Mobile against Eslava, 9th Porter, 578, and by the Supreme Court of the United States in Pollard vs. Hagan, 3rd Howard, 212; in the City of Mobile vs. Eslava, 16th Peters, 240, and in Goodtitle vs. Kibbe, 9th Howard, 471, that the title to these lands was vested in the State of Alabama, and in order to carry out the purpose of the act of Congress of May 26th, 1824, that the Legislature of the State of Alabama passed the act of January 31st, 1867, Acts of Alabama, 1866-7, p. 307. (Record, p. 45 and 46.)

It would certainly now be a most curious result should the City of Mobile be held not to be entitled to these lands by reason of the denial of the very fact the existence of which was, in these cases held to defeat the grant from the United States Government to the City of Mobile.

The decision which is now sought to be reviewed, adhering to the established doctrine in Alabama, as indeed of all the courts where the question has been considered unaffected by the statute, has held that the patent of the United States describing the grant as bounded by a tidal stream, would pass title only to the high-water mark, both because such would be the proper construction of the grant, and because the Federal Government owned no title beyond this point to convey. Before examining into the decisions on this point, however, we beg to cite the following cases as establishing the proposition that the State decisions upon this point are conclusive upon this court.

Barney vs. Keokuk, 94 U. S., 324.
St. Louis vs. Rutz, 138 U. S., 250.
Water Power Co. vs. Water Comrs., 168 U. S., 357.
Shively vs. Bowlby, 152 U. S., 1.
I. C. R. R. vs. Illinois, 146 N. S., 517.

We have made our investigation exhaustive, and State at the beginning of this argument, that although the questions about to be presented have been repeatedly considered both in England and in almost every State in this union, we have found no case where a grant by the government to an individual, of lands bounded by a *navigable stream where the tide ebbs and flows*, has ever been held to carry the shore below the high water mark; nor does there exist (we believe) a case where the space between high and low water mark even upon a navigable stream *above* the ebb and flow of the tide, was ever held to pass to a patentee of the United States Government under a patent issued subsequent to the admission of the State in which the lands were situate, where as in the case at bar, the State or its assignee was asserting title thereto.

The question first came before the Supreme Court of Alabama, in the case of Mobile vs. Eslava, 9 Porter, 577, where it was held that the title to this land passed from the United States to the State of Alabama in 1819, by virtue of the compact under which Alabama became a member of the Union, and that a subsequent patent from the United States passed no title whatever. This case was cited with approval, and affirmed in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and the doctrine there asserted was re-affirmed by the Supreme Court of Alabama in the later case of Kennedy vs. Bebee, 8 Ala, 909, and in Pollard vs. Greit, 8 Ala., 941.

The case of Mobile vs. Eslava, was appealed to the Supreme Court of the United States, and was by that court affirmed.

16 Peters, 234.

This Alabama doctrine has also been thoroughly established by the Supreme Court of the United States.

Pollard vs. Hagan 3 How., 212.
Goodtitle vs. Kibbe, 9 How., 471.
Hoboken vs. Pa. R. R. Co., 124 U. S., 656.
Shiveley vs. Bowlby, 152 U. S., 55.
Water Power Co, vs. Water Comrs., 168 U. S., 357.
Hallett & Walker vs. Bebee, 13 How., 25.
And other authorities that will be mentioned hereafter.

In Weber vs. Harbor Comrs., 18 Wal., 64, it seems that one who obtained title from the Government which itself had parted with title to the shore, did not become entitled to any riparian rights whatever.

In each of these cases constituting four distinct decisions of the Supreme Court of Alabama, as well as several decisions of the Supreme Court of the United States, the question as to the title of the patentee of the United States government under the patent issued subsequent to the admission of the State into the Union, for the lands between high water mark and low water mark, was distinctly presented. It was the only question in the cases. It was elaborately considered, and unquestionably decided, that neither the United States government, nor a private individual, can grant a title which it does not possess.

Not only is this court bound by the decision of the Supreme Court of Alabama, and not only has the Supreme Court of Alabama frequently decided these questions, but those decisions were right, as we shall attempt to demonstrate. It is said that this doctrine, so firmly settled upon the early judicial history of our State, and which has been again reiterated in the decision of the case at bar, is opposed to the case of Webb vs. Demopolis, 95 Ala., 116.

It would do but little credit to the eminent jurists, who concurred in this opinion, to suppose that it was their intention to overrule several former decisions of their own bench, which had been cited with approval not only by the Supreme Court of Alabama, but repeatedly by the Supreme Court of the United States, and which reasserted the same doctrine at intervals of ten years apart, and this, without even a citation or mention of these cases, or the slightest consideration of the doctrine therein established or the citation of a single case which conflicted with them; it would be indeed unfortunate for the inhabitants of the State of Alabama, if the rules of property which had stood unquestioned for several generations were to be changed without a discussion, or a mention of the former decisions of the

Supreme Court of Alabama by which they had been so repeatedly asserted. These considerations assure us of the conclusions which we have reached, to the effect that these cases do not in the slightest conflict.

It is said in the case of Webb vs. Demopolis, 95 Ala., 129, "whether the grant made by the United States to George S. Gains for the Demopolis Town Company, and which enured to its benefit, of the land upon which the city of Demopolis now stands extended to ordinary high water mark, or to the line of the low water, or to the middlethread of the Tombigbee River, depends therefore upon the rule of property in this respect which Alabama has adopted. The rule which this State has adopted and declared through this court is, that a grant by the United States to land bordering *on a navigable river* includes the shore of bank of SUCH RIVER, and extends to water line thereof at low water." (The emphasizing by capital and italics in this and the following quotations are our own.)

How then are we to reconcile this language with the cases already cited and with the opinion in the case at bar where it has been repeatedly asserted, "that a grant by the United States to lands bordering on a navigable *stream where the tide ebbs and flows extends only to high water mark?*"

The cases are plainly distinguishable upon other grounds to be mentioned hereafter, but the distinction which is made most prominent by the universality of its adoption and that drawn by the cases themselves, is to be found in the fact that in *Webb vs. Demopolis* the court was considering the rights of a riparian owner upon a *navigable river where the tide does not ebb and flow*, while in the cases cited by the plaintiff in error and in the case at bar, the lands in question constitute the shore and the bed of the *tide waters* of the state

The common law of England, so far as it is applicable to our institutions and remains unchanged by our statutes, is the law of Alabama, and from the policy of this law no state in the union has, in this matter, ever departed so as to extend the

rights of a riparian owner. Owing to the fact that in England the rivers above the ebb and flow of the tide are, as a rule, small and unimportant, the title of the riparian owners thereon, was extended to the middle of the stream, while the right of the riparian owner, upon waters where the tide ebbs and flows, was restricted to the high water mark. The rule has never been otherwise in England, and no court either in England or in America has ever extended the common law right of a riparian owner. Some of the states, Alabama amongst them (see Webb vs. Demopolis supra and cases there cited,) have *restricted* the right of a riparian owner upon streams which were in fact *navigable, although above the ebb and flow of the tide.* Some of these states have restricted them to the low water mark; others to the high water mark, while others adhere to the old common law distinction and permit them to hold to the middle of the stream. The difference in the rule which prevails in the several states which adhere to the common law and those which have modified the rule upon our great river, rests entirely upon the difference between them as to what shall constitute the test of navigability. The test most consonant with good sense is that, of course, which has been adopted in Alabama, where it is a question of fact to be determined by the practicable test of whether the stream is actually navigable; many of the states hold to the distinction of the common law. Those states that adopt the Alabama rule hold that the same reason which restricts the riparian owner to high water mark where the tide ebbs and flows, alike operates where the stream is actually navigable, though above the influence of the tide, and therefore restrict him, in some states, to high water mark and in other states to low water mark. The modification of the common law, however, in every case has been a restriction and not an extension of the riparian ownership. The difference between those states which do restrict the upland owner upon a non-tidal stream, grows out of the simple fact that some courts have overlooked the fact that upon non-tidal streams there is really

no established high water mark, since the extent of the rise depends upon the character of the season, while other courts have observed this fact and the consequent inapplicability of the high water mark limit and have therefore restricted the owner to the low water mark, which upon non-tidal streams is the only established line. Where the common law has not been strictly adhered to, it has been—in every case—because the reason which restricted him in England where the tide ebbed and flowed, alike restricted him in America where the *river* was actually navigable.

This, an investigation of the cases will demonstrate, is the rationale of the rule and this is the distinction which existed between the case and the City of Mobile vs. Eslava and that of Webb vs. Demopolis. In other words, the latter case only decides, that in Alabama, the Demopolis Co., was *restricted* to low water mark, although at common law its title would have extended to the centre of the stream; and this because the reason of the rule which restricted the riparian owner where the tide ebbed and flowed, also restricted him to the only established shore line where the river was in fact navigable, though the tide did not ebb and flow. While in Mobile vs. Eslava and in the case at bar the riparian owner, being upon a stream where the tide ebbs and flows, owned at common law only to high water mark and was therefore confined to that limit.

In the case at bar the Supreme Court of Alabama has taken judicial knowledge of the fact that the tide does ebb and flow in the Mobile river throughout our city front. In this it was justified by

12 Amer. & Eng. Enc. (O. S.), 169.
Walker vs. Allen, 72 Ala., 456.
Metzger vs. Post, 15 Vroom, (N. J.), 77.
Cash vs. Auditor of Clarke Co., 7 Ind. 227.

The Federal Court will not construe a grant bounded by a navigable stream as conferring any title below the high water mark, although the State may allow riparian rights below this.

Packer vs. Bird, 137 U. S., 669.

In Shively vs. Bowlby, 152 U. S., 43, it is said:

"By the common law as before remarked, such additions to the land on navigable waters belong to the Crown, but, as *the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide;* that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide waters, found in the monuments of common law, long prevailed in this country, notwithstanding the broad difference existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and in-land seas; and under the like influence it laid the foundation in many states of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as above remarked, is for the several states themselves to determine."

That the modification of the common law has been a *restriction and not an extension* of the right of the riparian owner is clearly stated in

Packer vs. Byrd, 137 U. S., 666,

where it is said:

"The question presented is, whether the patent of the United States describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, and running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by

the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.

"It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high water mark. The title to land below that mark in such cases is vested in England in the Crown, and in this country in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of considerable extent, are navigable in fact, which are not subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide water, and by vessels larger than any which sailed on the seas when the common law rule was established. A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of the Daniel Ball, 10 Wall., 557, 563: 'They are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.'

"The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common law doctrine on this subject, prevailing in England, is held in some of the States, but in a larger number has been considered as inapplicable to the navigable waters of the country, or, even if prevailing for a time, has given way, or been greatly modified, under the different conditions there."

Again in 137 U. S., p. 669, it is said:

(Texas)—Mayor of Galveston vs. Menard, 23 Tex., 349.
(Washington)—Eisenback vs. Hatfield, 2 Wash., 236. (26 Pac., 539).
" Harbor Line Comrs. vs. State, id., 531. (27 Pac., 550).
" Morse vs. O'Connell, 7 Wash., 117. (34 Pac., 426).
" Allen vs. Forrest, 8 Wash., & 702. (36 Pac. 971).

There is a dictum to the contrary, in the case of Peck vs. Lockwood, 5 Day, 22 (Conn.) but that was subsequently repudiated in the case of Chapman vs. Kimball, 9 Conn., 40.

The cases in Maine, Massachusetts and New Hampshire are not exceptions to the rule, since the colonial ordinance of 1641, which was in effect a statute, expressly extended the right of riparian proprietor in the soil from high to low water mark.

(Maine)—Parker vs. Cutler, Mildam Co, 20 Me., 357.
" Babson vs Tainter, 10 Atlantic Rep, 63.
(Massachusetts)—Mayhew vs. Norton, 17 Pick., 359.
" Green vs. Chelsea, 24 Pick., 77.
" Salstonstall vs Proprietors, 7 Cushing, 195.
" Boston vs. Richardson, 105 Mass., 354.
(New Hampshire)—Clements vs. Burns, 43 N. H, 609, 621.
" Nudd vs. Hobbs, 17 N. H., 524.

The writer is far from any desire to dispute the correctness of that policy which is announced in Webb vs. Demopolis, and which restricts common law right of the riparian owner upon navigable rivers above the tide; indeed he can see no just reason for permitting him to occupy below the high-water mark if such a thing exists upon non-tidal streams; it seems to us that there is no real distinction between a navigable stream where the tide ebbs and flows and a navigable stream where the tide does not ebb and flow; the distinction was adopted in England because it was regarded as a reliable test of navigability, and it should be wholly discarded in America where it is known to furnish no test whatever. Far from complaining that our court has abandoned the test in part, we are quite sure that the logical solution of the question if the writer is wrong in supposing that there is really no such thing as a high-water line on non-tidal

stream, is to abandon the distinction *in toto* since it is entirely inapplicable to our surroundings. The distinction has been wholly abandoned in many states, and in every instance where it has been wholly discarded, the riparian owner has been restricted to high-water where the stream was navigable, and in no single instance has his title ever been extended where the tide ebbs and flows.

McManus vs. Carmichael, 3 Iowa, 1.

People vs. Canal Co., 33 N. Y.. 466-7.

The abandonment of an erroneous rule—one founded upon the topography of England and utterly inapplicable to America—should be entire and not partial.

To restrict the owner to high-water mark wherever there is such and the river is actually navigable is the logical rule and that which is approved by the Supreme Court of the United States.

Barney vs. Keokuk, 94 U. S , 324.
Packer vs. Byrd, 137 U S., 671.

But there are other grounds upon which we may reconcile Mobile vs. Eslava, 9 Port., 603.

Goodtitle vs. Kibbe., 1 Ala., 403.
Pollard vs. Greit, 8 Ala., 940.
Kennedy vs. Bebee, 8 Ala., 914.

and the many cases in the Supreme Court of the United States with the cases of Webb vs Demopolis and those upon which it rests, and upon which we may justly claim that these later decisions do not affect the case at bar.

It seems to us to be clear, thar since the grant which was construed in the case of Webb vs. Demopolis, was a grant by the United States Government before the admission of the State into the Union, this case has no application whatever. There the title to the land in question had never been conveyed to the State. The question therefore as to how far the title extended was only a question of construction, or of intent. The grantor in the instrument to be construed in those cases, held at the time of the grant, the title to the land not only down to the high

water mark, but also to low water mark. The question in the present case is a question of the power of the United States Government to grant what it did not possess. The question as to the effect of the grant by the United States Government describing the lands as far as the low water mark, but made at a time when the government possessed no title below high water mark, was not presented in the case of Webb vs. Demopolis, and ought not to have been, and was not decided in that case. On the contrary, in the case of the City of Mobile vs. Eslava, 9 Porter, 603, and in the case of Goodtitle vs. Kibbe, 1 Ala., 403, and in the case of Pollard vs. Greit, 8 Ala., 940, and in the case of Kennedy vs. Bebee, 8 Ala , 914, and in the several decisions of the Supreme Court of the United States, the question was, as it is here, not only as to what land was described in the patent, but also as to what effect was to be given to a patent issued by the United States Government to land which it had already conveyed to the State of Alabama, and to which it therefore possessed no title. In all of these decisions it was expressly desided that where the United States Government had parted with its title to the land to the State of Alabama, by admission of the State into the Union, as it did with all shores of navigable streams not already disposed of, a subsequent patent by the United States Government was wholly void, and passed no title, that is to say, it neither passed the title from the United States Government nor operated to pass the title out of the State, and in each of these cases it was distinctly held that the patentee of the United States Government could not maintain ejectment for the possession of the property.

Pollard vs. Hagan, 3 Howard, 212
Goodtitle vs. Kibbe, 9 Howard, 471.

What we have said seems to us to demonstrate that the case of Webb vs. Demopolis, 95 Ala., 126-7, is in nowise in conflict with the doctrine formerly established in this State in Mobile vs. Eslava, 9 Port, 577.

The only cases cited by Webb vs. Demopolis, in the 95th Alabama, were those of

Williams vs. Glover, 66 Ala., 189.
City of Demopolis vs. Webb, 87 Ala., 670.
Doe vs. James, 11 Ala., 63.

None of these cases cite any Alabama cases, with the exception of the case of

Howard vs. Ingersoll, 17 Ala, 790.
Bullock vs. Wilson, 2 Porter, 436.
Mayor of Mobile vs. Eslava, 9 Porter, 577.

Demopolis vs. Webb, 87 Ala., 670, is the same case as Webb vs. Demopolis in the 95th Ala., and this case, therefore, needs no further discussion.

In the case of Williams vs. Glover, it is tersely said "The ownership of plaintiff extends to the margin of the water, at ordinary stage, and hence embraces the land between high and low water marks." This again was a case where the land in question was upon a navigable river, but above the ebb and flow of the tide. That this authority did not intend to overrule the case of Mobile vs. Eslava in the 9th Porter, is evidenced by the fact that it cites that very case as the authority for the assertion just made. Williams vs. Glover was an action by a landlord against a tenant for rent. The tenant, could not, of course, dispute the title of his landlord to the land described in the lease. He had the right, and the simple right, to raise the question as to the proper construction of the terms of the lease, and whatever the lease described, the landlord was supposed to own, provided, of course, it was susceptible of private ownership. The report does not show upon what title the lanlord relied. This title may have been derived from the State, and not from the United States Government at all, or it may have been derived from the United States before the admission of the State into the Union. The question which is now before the court was not in the slightest involved in the case of Williams vs Glover, and it was not discussed or considered. It is, at most, a dictum that a grant made by the Government which owns the

land and which bounds the grant by the river, above tide waters, would be construed to intend to convey to the low water mark.

The case of Howard vs. Ingersoll, in 17 Ala., 790, is not a case where the construction of a grant to an individual was under consideration. That case involved simply the construction of a treaty, and it was there held that where the dividing line between two states was established as the river line on one side, the line referred to must be supposed to be low water mark. But the ground of this decision is simply a question of convenience in political divisions of government, it being apparent that it would be dangerous, as well as inconvenient, if the jurisdiction of one state should extend across the river up to the high water mark on the other side, while the jurisdiction of the other state extended only as far as high water mark on its own side of the river. If such a construction were given to the treaty, it would of course, create the ownership in one state of a narrow strip of land lying across the river from any other portion of its territory, which would be of such a character that it could not be inhabited, and therefore impossible to police, a result which would, of course, be ruinous. The question as to the effect of the grant by the United States Government of land bounded by a river, or other navigable stream, subsequent to the time when the United States Government had ceased to have any title to the land below high water mark, was not, to any degree, involved in that case, and indeed, it was not even material in that case as to what would have been the proper rule of construction of the individual grant bounded by a river, made by a government while owning the land to the centre of the river. Indeed, in that very case, Chief Justice Dargan said that he did not think it necessary to examine the numerous decisions with which our books abound, and to many of which they had been referred, for the reason that they had reference to the rights of individual owners. *But, however this may be, the river which was in question in Howard vs. Ingersoll, 17 Ala., 790, was not a nav-*

igable stream, and on pages 791 and 792, the chief justice expressly distinguished between the cases which he was considering, and the cases where the land was bounded by navigable water where the tide ebbs and flows.

The case of Kennedy vs. Jones, in 11 Ala., 63, does however, relate to a part of the water front in the City of Mobile, but does not in any manner affect the question under discussion. This decision was rendered by Chief Justice Collier, the same judge who rendered the decision in Eslava vs. City of Mobile, and the subsequent case of Pollard vs. Greit, in 8 Ala., and it would have been queer had he intended to assert anything in conflict with these cases after they had been approved by the Supreme Court of the United States, and without in any manner referring to them, and it is not surprising, therefore, to find that there is nothing whatever in the case of Kennedy vs. Jones, intimating in the slightest degree that the grantee of the United States Government under a patent issued subsequent to the admission of the State into the Union, took any thing below high-water mark. In this case of Kennedy vs. Jones, on the contrary, see pages 84, 85 and 86, it was held that the grant to the soil below high-water mark, had been made by the Spanish Government long before the admission treaty under which the United States Government obtained title to the property in question, and that transfer of the possession of Mobile and the adjacent country from Spain to the United States in 1813, did not interfere with the title below high-water mark, *which had been already expressly granted to the City of Mobile by the Spanish Government.*

In the case of Bullock vs. Wilson, 2 Porter, 445, it was distinctly held that the grantee of the United States Government did not take beyond low-water mark but whether he took between high-water mark and low-water mark was not presented by the facts in the case. The holding in that case was simply to the effect that the riparian owner could not claim below low-water mark, and the court does not discuss the question as to

whether he could go to that extent, or not, that being entirely irrelevant to the case. *In addition to this, this case was not a case of tide water, but the property in question was bounded by the Coosa river.*

These are the only cases decided by the Supreme Court of Alabama, which are relevant to the question in hand, so far as we have been able to discover. A careful reading of these cases will demonstrate that every time that the question now urged upon the court, that is to say, the question as to the effect of the grant by the United States upon land *bounded by tide water*, made by the United States Government, *subsequent* to the admission of the State of Alabama into the Union (including several distinct submissions), the Supreme Court of Alabama has emphatically declared that the title of the patentee of the United States Government extended only to high-water mark.

There is, therefore, no conflict whatever in the decision of the Supreme Court of Alabama.

From what we have said and from the authorities we have cited, it seems to us inevitably to follow that the title to the shore and bed of the Mobile river passed from the United States to to the State, at the time of her admission into the Union, that the patentee of the United States' Government, under a patent issued subsequent to that date, took no title below the high-water mark, and that the extent to which an abutting owner may be allowed to use the shore of a tidal stream upon which his land is bounded, is a question of state policy which cannot be here reviewed or controlled.

THE POWER OF THE STATE OF ALABAMA TO GRANT THESE LANDS TO THE CITY OF MOBILE. NO INTERFERENCE WITH COMMERCE. The discussion of this subject ends on page 32

It is a curious but inevitable result of the contention of the plaintiff in error, that the State had no power by direct grant to convey the lands in question to the City of Mobile, but that the plaintiff in error did, nevertheless, by an indirect act obtain this very title from the State; or, in other words, that it would

be a serious breach of public policy for the state to part with its title to any one, unless it was to the plaintiff in error.

The plaintiff in error has, we think, suffered itself to confuse the idea of practical interference with navigation and the consequent interference with interstate commerce, with the idea of a transfer by the State of its title to the shore of a navigable stream, to a municipal corporation or private individual. Over the former question in streams that are navigable for interstate commerce, the federal courts are vested with jurisdiction by that provision of the federal constitution which confers upon Congress the power to regulate commerce between the States, but there is no provision in the federal constitution whatsoever which vests the federal court with authority to review the decisions of the State courts in regard to any disposition of the shores, or the soil under the navigable stream within the State, which does not operate as a practical and actual interference with navigation or commerce.

A State may in fact authorize even an obstruction to commerce, in the absence of any exercise of congressional authority,

Leovy vs. United States, 177 U. S., 629.
Wilson vs. Blackbird Creek, 2 Peters, 245.
Withers vs. Buckley, 20 How., 84.
Cardwell vs. American Bridge Co., 113 U. S., 205.
Williamette Bridge Co., vs. Hatch, 125, U. S., 1.
Shively vs. Bowlby, 152 U. S., 133.

and indeed, Congress has never undertaken to exercise any authority over navigable streams above the established channel line.

Leovy vs United States, 177 U. S, 629; see also
The act of March 3, 1899, 53rd Congressional session, third chapter, 435, sections 9 and 10, page 1151.

It is to be observed as to what is pointed out in the case of Leovy vs. U. S., 177 U. S., 629, that the control of the federal court over navigation does not arise out of any constitutional provision relating to the title to the land or the possession thereof, but refers only to the matter of regulating commerce between the foreign nations and between the states and extends

only to those things which interfere therewith. It does not relate to the uses of the shore which are not inconsistent with such navigation or commerce. This is altogether a question for the state authority.

Water Power Co. vs. Water Commissioners, 168 U. S., 358.
Packer vs. Bird, 137 U. S., 661.
St. Louis vs. Rutz, 138 U. S., 226.
Kaukauna Water Power Co., vs. Green Bay Co., 142 U. S., 254.

The case of the I. C. R. R. Co. vs. Ill., 146 U. S., 387, is relied upon by the appellant to establish the proposition that it was not competent for the Legislature of the State of Alabama to convey to the City of Mobile the lands in question. That case when closely examined, however, is very far from so holding. It may be conceded it is true, that the effect of the case is to limit a grant of this kind in character to a license, revocable by the State, in so far as it extends beyond the point of practical navigability of the stream. It is, however, expressly held in that case that a grant by the State even to a private individual, would be entirely valid down to the line where the stream is practically navigable, and that beyond this, even the bed of the lake could be granted to a private corporation; although this grant would remain revocable at the election of the State. In that case, on page 435, it is said:

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce with foreign nations and among the States. *This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.*"

There is absolutely nothing in this case to justify the belief that the state could not grant to the city the land to the channel line in absolute fee simple, or even grant to the City

of Mobile, the land below this line, although this portion of the grant might be revocable.

Upon this view of that case this Court upon the second appeal confirmed the grant by the State to the Railroad Company down to the point of practical navigability, which seems conclusive.

It will be observed, as was pointed out in the opinion of the Supreme Court of Alabama, that far from constituting a hindrance to navigation or commerce, the grant to the City of Mobile had for its very object the furtherance thereof; that it was in performance and preservation of the public trust that the grant was made.

Indeed, to hold that a wharf could not be owned either by the City, or by private owners would be ruinous to the commerce of the State of Alabama. The State of Alabama has never erected any wharves of its own, and such a holding would prevent their erection in the future by municipalities or private persons or corporations acting under grants from the State and thereby render Alabama's only port entirely unavailable.

The right of disposition of land by the State to the channel of the river seems to be settled in Shiveley vs. Bowlby, 152 U. S., 46-7.

C. J. Taney in Goodtitle vs. Kibbe, 9 How., 478, speaking of the power of the government to convey this very shore, said:

"Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant *before Alabama became a State*. But this was not done.

"If they chose to resign to the riparian proprietor rights which properly belonged to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin vs. Waddell, 16 Pet., 367; Pollard vs. Hagan, 3 How., 212; and Goodtitle vs. Kibbe, 9 How., 471. These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters."

The paragraph last above we have quoted from Packer vs. Bird, 137 U. S., 671, where it is quoted from Barney vs. Keokuk, 94 U. S., 324.

"With regard to grants of the Government for lands bordering on tide water, it has been distinctly settled that they on extend to high-water mark, and that the title to the shore a lands under water in front of lands so granted enures to t State within which they are situated; if a State has been ganized and established there. * * * * The State m even dispose of the usufruct of such lands, as is frequent done by leasing oyster beds in them and granting fisheries particular localities; also *by the reclamation of submerged flats*, a the erection of wharves and piers and other adventitious aids commerce. Sometimes, large arears so reclaimed are occupi by cities, and are put to other public or private uses, Sta control and ownership therein being supreme, subject only the paramount authority of Congress in making regulations commerce, and in subjecting the lands to the necessities a uses of commerce."

Hardin vs. Jordan, 140 U. S., 381-2.

The Supreme Court of the United States, in Hoboken v Penn. R. R. Co., 124 U. S., 690, after quoting with approv from Stevens vs. P. & N. R. R., 34 N. J. Law, 532, summed u the quotation thus:

"It was therefore, held in that case that it was competer for the legislative power of the State to grant to a stranger lan constituting the shore of a navigable river under tide wat below the high-water mark, to be occupied and used with stru tures and improvements in such a manner as to cut off the acces of the riparian owner from his land to the water and that wit out compensation to him for the loss.."

See State vs. Jersey City, 32 N. J. L., 525.
People vs. Canal Co., 33 N. Y., 466-7.

The State may grant a right of way to a railroad to co struct its road between low and high-water marks, and the fa that this interferes with the riparian owner's access to the wat does not give him a right of action. His right to use the water is his, as a member of the community, and not as riparian pr prietor, and this right is subject to sacrifice by legislative ac for the public good.

Gould vs. Hudson R. R. Co., 6 N. Y., 522.

The State has power to make an absolute grant of the tit to submerged lands to the City or to any third person.

Knight vs. U. S. Land Co., 142, U. S, 183.
Lowndes vs. Huntington, 153 U. S., 59.

(Alabama)—Hagan vs. Campbell & Cleveland, 8 Port., 25.
City of Mobile vs. Eslava, 9 Port., (Ala.) 578, S. C., 16 Pet, U. S., 251.

(California.)—Eldridge vs. Cowell, 4 Cal., 87.
" Ward vs. Mulford, 32 Cal., 366.
" Chapin vs. Bourne, 8 Cal., 295-6.
" Dana vs. Jackson-street Wharf Co., 3 Cal., 138, s. c. 89, Am. Desc. 164.

(Connecticut.)—East Haven vs. Hemingway, 7 Conn., 198.
" Simmons vs. French, 25 Conn., 346.

(New Jersey.)—Gough vs. Bell, 1 Zab., 157.
" State vs. Jersey City, 1 Dutch, 525.
" State vs. Brown, 3 Dutch, 14.
" State vs. Collector, 4 Zab, 108.
" Keyport & C. Co. vs. Farmers' Tranp. Co., 3 C. E., Gr., 511.

(New York.)—Gould vs. H. R. R. Co, 6 N. Y., 522.
" People vs. Tibbetts, 19 N. Y., 528.
" Williams vs. Mayor, 105 N. Y., 420, (11 N. E. 829.)

(Ohio.)—Blanchwood vs. Porter, 11 Ohio, 138.

(Texas.)—Mayor of Galveston vs. Menard, 23 Tex., 349.

(Virginia.)—McCready vs Commonwealth, 27 Grattan, 985.

(Washington.)—Eisenbach vs. Hatfield, 2 Wash., 236. (s. c., 26 Pac. R., 589.
" Morse vs. O'Connell, 7 Wash., 119. (s. c. 34, Pac. R., 426.)
" State vs. Prosser, 27 Pac. R., 550.

(Wisconsin.)—Wisconsin R. I. Co. vs. Lyons, 30 Wis., 65.
" Cohn vs. Wausau Broom Co., 47 Wis, 34-35. (2 N., 546.)

(Mississippi.)—Martin vs. O'Brien, 34 Miss., 22.

THE PLAINTIFF IN ERROR IS NOT IN A POSITION TO RAISE THE QUESTION.

If the Supreme Court of the United States possesses any jurisdiction over this case, by reason of any objection to the state conveying the title to the shore on the Mobile River, to the City of Mobile, it must be because such a conveyance is unconstitutional as an interference with interstate commerce. We do not understand that the constitutional objection to a

grant by a state can be raised by any person who happens to desire to defeat the title of the grantee.

In the first place, the constitutionality of an act of the legislature should never be passed upon until it becomes necessary to the decision of the cause.

Smith vs. Speed, 50 Ala., 276.
Jones vs. Black, 48 Ala., 540.
Joiner vs. Winston, 68 Ala., 129.

It is not necessary, in this cause, to consider the question as to whether this act of the legislature is constitutional or not. The plaintiff in error in the case claims title to the lands in question under a patent from the United States Goverment, which was issued subsequent to the time that the United States Government had parted with its title to the State of Alabama. It has no title, therefore, to the lands in question, whether the act of the legislature granting these lands to the City of Mobile is valid or void. If the act is valid, the city has the title; if the act is void, then the state still retains the title. In neither event has the defendant in error any title. The defendant in errors' rights to the lands in question were not, therefore, affected in any manner by the grant of these lands from the state to the city, and it is thoroughly settled both in Alabama and elsewhere that the court will not "listen to an objection made to the constitutionality of an act of the legislature by a party whose rights it does not specifically affect. An act of the legislature will be assumed to be valid until some one complains, whose rights it invades; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power to pronounce it void *as to him, his property or his rights*, that the objection of unconstitutionality can be presented and sustained."

Jones vs. Black, 48 Ala., 540.
Shehane vs Bailey, 110 Ala., 310.

In the case of Dejarnett vs. Haynes, 23 Miss., 603, which is cited with approval in Jones vs. Black, supra, the court said: "To entitle a party to insist upon the unconstitutionality of a

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law on the ground that it affects or impairs a right secured to him by the constitution, it must first be shown that he has the right. What right can be affected by the law in this case? We answer, only the title of Hubbard and Greene. Has the plaintiff shown that he has acquired either their title or possession under them? Certainly not, he has, therefore, failed to exhibit to the court any right which could be invaded by the legislature. No one but the party or person claiming under him, whose rights are affected by an act of the legislature, can plead its unconstitutionality."

In the case of St. Clair vs. Jackson, 8 Cowen Reports, 543, opinion pages 678-9, which was an action of ejectment, it is expressly decided that the defendant can not set up the unconstitutionality of an act of the legislature under which the plaintiff obtains his title from a third person. This opinion is directly in line, and is exceedingly interesting.

Speaking of this matter in the case of Wellington et als, Petitioners, the Supreme Court of Massachusetts, 16 Pickering, 96, said: "Perhaps, however, it may well be doubted, whether a formal act of the legislature can ever with strict legal propropriety be said to be void; it seems more consistent with the nature of the subject, and the principles applicable to analagous cases to treat it as voidable, but whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and this injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons whose rights are thus affected. *Prima facie* and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation and calls in the aid of judicial powers, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained."

In the case of People vs. Brooklyn & Coney Island R. R. Co., 89 N. Y., page 73, opinion page 93, the same doctrine is asserted. See also People vs. Turner, 2 N. Y., Sup., page 253.

In the case of Jackson vs. Hudson, 3 Johnson Reports, 375, which was an action of ejectment, the court said: "The policy or the abstract right of granting lands in the possession to the native *Indians*, without their previous consent as original lords of the soil is a political question with which we have, at present, nothing to do. It cannot arise or be discussed in a contest between two of our own citizens neither of whom deduce any title from the *Indians*. What would be the effect of an *Indian* possession or title in opposition to the grant under the patent, if they were to be brought into collision, is not a question before us."

SECOND.

The Right of Wharfage, Both By License and Accretions.

This discussion ends on page 64.

We are not unconscious of the fact that the plaintiff in error will claim to have undertaken to establish that it had erected a wharf upon the lands in suit, prior to the grant to the city and that the acquiescence of the state operated to confer upon it a license which, when exercised, became irrevocable. This question was never presented either in the trial court or in the Supreme Court of Alabama, for while the plaintiff in error offered evidence of having at one time driven certain pilings, it did not offer to prove that this was before the grant from the state to the city.

There are states, New Jersey for instance, in which it has been held that such a license is granted by the state as a matter of custom, and without any express statute. The doctrine has been referred to and recognized in the case of Shively vs. Bowlby, 152 U. S., page 35. When we cast about, however, for a principle upon which to rest the doctrine that a mere license

when exercised becomes irrevocable (even if we leave out of view the fact that the complainant has really offered no evidence either of the existence of such a license or of its exercise before its revocation,) we inevitably fall upon the doctrine of estoppel. There is no other principle upon which the idea can be supported, and unless the doctrine of estoppel will save such a transaction from the statute of frauds, it is inevitably under its ban. We shall, therefore, inquire as to what just basis there is for the idea that even the building of a wharf in front of the property in question under an express license from the state, would have operated an estoppel against the state from subsequently revoking the license in bringing a suit in ejectment.

Should the doctrine which the plaintiff contends for be established, however, it could become applicable only after it had been established; First, that the plaintiff in error was the abutting owner; Second, that the right of wharfage is a right to exclusive possession; Third, that by common law a license to wharf is vested in the abutting owner, or Fourth, that the State had granted a license which was exercised before revocation. We shall discuss these questions, and then take up the doctrine of estoppel.

(a) *Defendant in error and not plaintiff in error is the abutting owner.*

The plaintiff in error insists, that being the owners of the upland which is bounded by the Mobile River, and having, therefore, a title extending down to the high water mark, they have, as incidental thereto, a right of wharfage, or, in other words, a right to the possession of the shore, and of the land under the water to the channel line of the river, for the purpose of erecting a wharf thereupon, and also the right to accretions.

It is however, always the owner of the shore, and not the owner of the lands abutting on the shore, that possesses the riparian rights, where the title to the shore has been severed from that of the upland.

Dana vs. Jackson, 89 Amer., Desc. 164.

Angel on Tide Waters, 254.
New Orleans vs. United States, 10 Pet., 662.
Gould on Waters, 3rd Ed. sec. 156-7.
Swetinger vs. St. Louis, 52 S. W., 349.
Saulet vs. Shepard, 4 Wall, 502.
City of New Orleans vs. Norris, 3 Ward, 118.
1st Amer. and Eng. Encyc. of Law, N. S. 469.
Sage vs. New York, 47 N. E., 1096.
Briggs vs. Pfeil, Vol. 25; 25 P. L. J., 18.

Riparian rights, as indicated by the name, follow the shore, and not the land above the shore, and where the City owns the bank of the river, it is the riparian owner and not the owner of the land above the high-water mark.

Gould on Waters, 3rd Ed. sec. 156 and citations.
New Orleans vs. United States, 10 Pet. 716.

(b) *The right to wharf out, where it exists, does not confer the right to the exclusive possession.*

Should we concede all that the plaintiff in error contends; namely, that it, being the owner of the upland, (which it argues, but does not prove,) has an easement upon the land sued for, while the State possesses the legal title, this would constitute no good defense to the City's action of ejectment, since the easement would not confer upon the owner thereof the right to the exclusive possession of the land. In short, the right of wharfage, when it exists, does not include the right to exclude the State, and its other citizens therefrom. This is true after the wharf has been built, and is perhaps even more apparent before the structure has been erected. This is, indeed, expressly declared by section 25 of the Declaration of Rights, in the Constitution of Alabama, in the following language: "That all navigable waters shall remain forever public highways, free to the citizens of the State and of the United States without tax, impost, or toll, and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same is expressly authorized by law."

(c) ***But no right to wharf or of accretions is shown, even assuming the ownership of the upland to be in complainants.***

It was not shown, and there was no offer to show, when, if at all, any wharves were erected, whether before or after the date when the shore and soil upon which they were erected, was granted by the State of Alabama to the City of Mobile in trust, or the date when the grant was made absolute by the act of December 5, 1896. That the express grant of the lands to the city, and the suit for the possession thereof, by the city, or indeed, either of these, did revoke any license which was at that time revocable, cannot be doubted.

Shively vs. Bowlby, 152 U. S., 1, and other authorities hereinafter cited.

The learned judge of the United States Court for the Southern District of Alabama, discussing another case where wharves had been built after the grant to the city, has replied to this suggestion as follows: "To the contention of the defendant that if any such license ever existed, it was revoked by the act of the legislature of January 31, 1867, it may be answered that the wharves and other structures referred to were constructed *subsequent* to the passage of the act, and hence the act could not have had the effect claimed for it; and further that the Supreme Court of Alabama has said that the direct effect and object of that act was to transfer the right and power of the State in and over the shore of the river and soil under it in front of Mobile, to the city, to be exercised by it as a State should exercise it for the general good in preserving the navigability of the river being impaired and in restraining purprestures along the river front below the high-water line, by prescribing the manner in which the structures should be built into or over the water."

The fact that the legislature intended by this act to invest the title in the city in trust for the public use, does not confer upon the court the power to control the exercise of this trust or to determine whether the public good requires a wharf at one place or no wharf at another, and the learned judge wholly

ignores the second act of December 5, 1896, which vested the absolute and unqualified title in the city. (See record page 48.)

The point made by Judge Toulmin that the exercise of a license was *subsequent* to the act revoking the license, and that, therefore, the act could not have had the effect of destroying the right, this writer is wholly unable to understand. He had seen it stated that it was necessary to the power to revoke an invitation or license, that the revocation should *precede* the acceptance or exercise thereof. Are we now to learn that the fact that the acceptance of a voluntary offer is *subsequent* to its withdrawal, renders the withdrawal nugatory? What then, is the result?

To say that a revocation is inoperative, because the acceptance or revocation is subsequent thereto, is to deny that the offer is revocable at all. To say that a voluntary offer is irrevocable to the injury of a party who has acted upon the faith thereof, is supported by reason and justice. To say that a license is revocable only *subsequent* to its exercise, would be no less ruinous than illogical. It would be wholly unjust. The statute granting the lands to the city shows upon its face a revocation by the state of any license which it, the state, might have extended to the plaintiff in error and others, to wharf out into the Mobile river.

Although the question has been constantly before the courts of England and of the United States, there does not exist, so far as we are aware, a single instance in which it has ever been held that an abutting proprietor upon tidal waters has, as against the state or its grantees, and independent of statute, a right of wharfage which cannot be revoked by the state at any time before its exercise, and we shall also attempt to demonstrate that the right of accretions rests upon the same principles.

After the exercise of a license by the State, the matter must be determined upon the principles of estoppel to be hereinafter discussed.

There are many authorities—notably, the case of Webb vs. Demopolis, 95 Ala., and Compton vs. Hawkins, 90 Ala., 414, where it has been decided that upon navigable waters which are above the ebb and flow of the tide, the owner of the upland possesses the right of wharfage.

There are also almost innumerable cases asserting in general terms, that accretions belong to the owner of the upland; but in none of these cases did the question arise between the owner of the upland or the state or its grantees, who had asserted the right thereto prior to the formation thereof.

It is easy, of course, to fall into the error of supposing that these two lines of cases are, to some extent, in point of our present discussion, more especially as they have been often indiscriminately cited. But even an imperfect analysis will suffice to demonstrate that they are not so. We have hereinafter undertaken to show that where the tide ebbs and flows the title of the upland extends only to the high water mark; while, upon stream above the ebb and flow of the tide, the rules vary in the different states, in many of which—and in Alabama amongst them—the title to the upland extends to the low water mark Where the title of the upland owner extends to the middle of the stream, or to the low water mark, or to the point of practical navigability he, like the owner of any other land, possesses the right to erect a wharf or anything else thereon, subject, of course, to the right of the state to regulate and protect navigation, and such is the reasoning and the result of the authorities to which we have referred. Where, however, his title stops at high water mark—as it does in Alabama, and in all the other states upon tidal waters—the reason of these cases fails, since the land to be occupied belongs, not to him, but to the state; so that if he wharfs thereupon, it must be by grant or license from the state or from whomsoever may own this soil at that date; and not against their will.

In the case of Revell vs. Pepper, 43 *L. R. A.* 795, *the Supreme Court of Illinois, in an able and exhaustive opinion covering the case at*

bar, said: "It is, however, suggested in the argument that this court, in passing upon the rights of riparian owners upon the Mississippi and other rivers in the state, navigable in fact, but not navigable at law, has held that the shore owner may 'wharf out' from the shore into the stream, and that the same doctrine should be extended to a shore owner on Lake Michigan. Those cases have no bearing here, for the reason that they are all predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water, he had the right to build such structures on his own land as he might desire, except such as might interfere with the navigation of the stream. Under the rule established in those cases, beginning with Middleton vs. Pritchard, 4 Ill. 510, 38 Amer. Dec. 112, it was held in Ensminger vs. People, 47, Ill. 384, 95 Amer. Dec., 495, that a riparian owner in the Ohio river, having the title to the land between high and low-water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land, and make reasonable charges for its use by those navigating the river. The right however, as is apparent from the rule established in that case, rests upon the ownership of the underlying soil."

We shall, therefore, make no further reference to those cases holding that the abutting owner on non-tidal streams may use their own land for the construction of wharves, since these cases throw no light, whatever, upon the inquiry as to the right of the upland owner where the tide ebbs and flows, who owns only to high water mark, and where the State owns the soil below.

There are also many cases asserting that the upland owner is entitled to accretions. Since this doctrine applies only to gradual accretions, and since none such are shown or in fact could possibly constitute a part of the land sued for which is bounded by the *present high-water mark*, it may be unnecessary to refer to this subject, except that we shall contend that the State may cut off all riparian rights, which have not already been exercised.

There are a number of cases holding that the upland owner is entitled to accretions to his land. These cases are of two

classes, which, to be sure, include the great bulk of the occasions upon which the questions of accretions have come before the court:

First, when the title to the upland and to the shore has never been separated, so that the Government which conveys the upland possesses, and may, therefore, convey, the riparian rights, and evidences its intention to do so.

Second, where the question has arisen between individuals, the State which owns the title to the soil, acquiescing, or in other words, licensing, the enjoyment of the accretions by the owner of the abutting property. These authorities have, however, no bearing where, as in the case at bar, the United States has parted with the title to the shore and therefore with all riparian rights thereover, before the issuance of the patent under which the uplands are claimed, and where the right of wharfage and of accretions being vested in the State, are denied by the State to the abutting owner or the license is revoked before its exercise, either expressly by statute or by conveyance of the shore to a city or to some other persons.

If the plaintiff in error in this case possesses any right to wharf out over the shore of the Mobile river, or to accretions formed thereon, since something cannot come from nothing, it is manifest that they must have been acquired from some government or person who possessed those rights, and who intended to pass them, unless the upland and the riparian rights are in law inseparable, which is not the case, as will appear by a great abundance of authority hereinabove already cited. That when the State of Alabama became a member of the Union, the title to the shore and bed of the Mobile river became its property, and that the question as to whom the right of accretions and of wharfage thereover should be permitted, became a question of the State policy, is settled beyond discussion.

Pollard vs. Hagan, 3 Howard, 212.
Goodtitle vs. Kibbe, 9 Howard, 471.
Hallett and Walker vs. Beebe, 13 Howard, 25.
Hoboken vs. Pa. R. R. Co., 124 U. S., 688.

Shively vs. Bowlby, 152 U. S., 55.
Water Power Co. vs. Water Comrs, 168 U. S., 357.
St. Louis vs. Rutz, 158 U. S., 250.
Barney vs. Keokuk, 94 U. S., 324.

There are only three methods known to the profession by which a State or an individual could confer upon the owner of the upland the right of wharfage or to accretions; first, by grant; second, by license; third, by estoppel. No grant is alleged or pretended. All licenses which are not based upon a valuable consideration, and, therefore, supported by a contract, are revocable, until exercised. If, therefore, our reasoning be sound, we should expect to find the following propositions supported by authority, from which it will necessarily result that the plaintiff in error, having no right of wharfage or to accretions, by grant, and not having shown the erection of any wharf or the formation of any accretions prior to the revocation of any license that may have existed, by a grant of the property to the city, can obtain no right thereto against the grantees of the State; viz:

First.—That when the shore passed to the state, it became its province to award or withhold the right of wharfage or accretions, and any such right must have been obtained from it by grant or by license.

Second.—That no common law right of wharfage ever existed, and that all such must originate from a grant or license from the state.

Third.—That it is competent for the state to sever the riparian rights, including both wharfage and the right to accretions, wholly from the upland, and to convey the same to any stranger to the owner of the upland.

Fourth.—That any license, whether granted expressly by statute or impliedly by usage, is at all times revocable by the state before its exercise, that is, before the wharf is built or the accretions formed.

Of the first and third of these propositions, we have already treated.

If we shall establish these second and fourth propositions, it

must, of course, follow: 1st. That the plaintiff in error not having shown any grant to themselves or to their predecessors, prior to the date when the shore passed to the state; and it having been shown that the state had granted to the city the absolute title to the shore before the exercise of any right of wharfage or the accrual of any accretions, the action cannot be defeated upon any idea of protecting a right of accretions to accrue in the future, or to wharves which have been built since such revocation or which are to be built in the future.

2nd. *That there was no common law right of wharfage and no license has ever been granted by Alabama to abutting owners to wharf out into tidal waters, and if it had, it would have been revocable and revoked.*

A great deal has been said in the arguments of this and similar cases as to the effect of certain statutes and ordinances establishing a harbor line in Mobile, and these have been urged as creating a license. We shall attempt to satisfy the court both by reason and upon authority, that such was not their purpose or intent. What we are about to say as to the revocability of a license resulting from usage or the common law, however, will be directly applicable to any license that could be implied from these statutes to be hereinafter discussed.

Since the learned judge of the United States District Court for the Southern District of Alabama has recently rendered an opinion in a case somewhat similar to that at bar, Sullivan Timber Company vs. City of Mobile, Fed. Rep., in manuscript, in which he has declared that the right of wharfage and of accretions upon the tidal waters in Alabama have been permitted to the owners of the upland by an immemorial usage of the state, it is interesting to observe that, had this opinion asserted that, any privileges created by this supposed usage were irrevocable by the state, at any time before its exercise either by the formation of the accretions or by the building of the wharves, it would have been diametrically opposed to the decisions of the Supreme Court of the United States and to those of the Supreme

Court of Alabama, but that, on the contrary, the learned judge in rendering that opinion, expressly declares: "This license did not vest any right until exercised, and could only be exercised by one possessing riparian rights, but when executed it was a lawful exercise of a privilege or license which became irrevocable, and especially where expenditures were made in reliance upon the license, as is alleged in the bill." Vol. 18, Am. and Eng. Encyc. of Law (2d. Ed.) 1145, Rhodes vs. Otis, 33 Ala., 578. Shively vs. Bowlby, *supra*.

While the question as to whether an invitation or license to wharf out, impliedly extended by long usage, is revocable before its acceptance or exercise, has never been directly presented to the Supreme Court of Alabama, further than in the case at bar, the question is not to be differentiated from the question as to whether any other offer, or license, or option, for which no valuable consideration has been given, may be withdrawn or revoked at any time before its acceptance.

Brost vs. Simpson, 90 Ala., 376.
Wilks vs. Ga. Rwy. Co., 79 Ala., 180.

It is at last all based upon the simple principles of contracts and of estoppels.

That at common law there existed in the abutting owner no right of wharfage upon tidal streams, and that whatever right of wharfage or of accretions he may have, must necessarily be derived from the State, either by grant or by license, is admitted by all. The learned district judge of the United States Court, in the case of the Sullivan Timber Co. vs. City of Mobile, admitting that no grant of such right has ever been made by the State of Alabama and that not even a license has ever been extended by the statutes of our State or recognized by the decisions of our courts, assumes to establish a policy for the State, based upon what he has been pleased to assert has been an immemorial custom to permit the building of wharves. From what source the existence of such a custom before his personal recollection has been ascertained, the learned judge has not stated.

In many of the states a license to wharf upon tidal streams has been extended by statute. In some of the states it has been extended by usage, but is manifestly not within the province of the federal courts to declare or to fix the policy of the states, certainly not a policy which is based upon an implied intent which is contrary to the constitutional provisions of that state (see section 25 of the Declaration Rights), and contrary to the decisions of the court of last resort in that state. Nor can a usage by a state establish a public policy until that usuage is recognized by authoritative action of its own officers. Until then the failure to assert a right might operate as laches in the particular case to whatever extent that doctrine may prevail against a government. It cannot, however, establish a policy to control other cases. This identical question as to the right of the abutting owner to wharf out in front of the land came directly before the Supreme Court of Alabama for the first time in the case at bar.

We do not think that any immemorial custom ever existed in Alabama to construct these wharves. On the contrary, the wharves that have been constructed upon the tidal streams in Alabama have been mainly constructed by persons claiming the title to the shore and the soil under Spanish grants or patents from the United States Government before the conveyance of the shore to the state, under which grants the title to the soil under the river and shore passed to the parties constructing the wharves. The facts, as we understand them to be, are that persons not holding or claiming such titles have never erected such wharves to any considerable extent. We shall, however, proceed to discuss the question as if by the custom of the past the State had tacitly acquiesced in the construction of wharves by abutting owners until it transfered the title to the city.

We might well understand how it might be a wise policy of the State to permit all abutting owners to wharf out in front of their lands, and how the State might continue for a great num-

ber of years to extend such license, and yet how the time might come when the wharves were demanded by commerce, and when the State would wait no longer upon the owners of the upland. Does the permission to wharf implied from acquiescence in the exercise thereof by others include the right to continue to hold the shore—which is the property of the State—without wharfing, and thus to defeat the object and consideration for which the license has been extended? Does the fact that the owner of a shore, whether it be the State or an individual, had for years acquiesced in the construction of wharves by abutting owners, confer any right upon those who have not availed themselves of the license? If it has been the policy of Alabama to permit the erection of wharves, what consideration has formed the basis of this policy, if it was not to induce the construction of these great aids, or we should say, essentials, to commerce? If the license be irrevocable even before exercise, the object of the policy is defeated since the abutting owner may refuse to wharf, and yet the State can not utilize its own property for this purpose. Let us illustrate; My lot is below the level of the street; the street is above the grade which is desirable to the city; therefore, the city says to me, "Remove the dirt from the street and fill in your lot." The offer stands open for years and it is made to all of the lot-holders on the street. Many of them remove the dirt, and doubtless the license is thereafter irrevocable as to them. I pay no attention to the matter until the time arrives when it is absolutely necessary for the public good that the streets should be lowered. Will any one deny that the city may withdraw the license, and authorize some other person to remove the dirt?

The doctrine of prescription can confer a right only upon those who have used that which they claim thereunder. The case of Shively vs. Bowlby, 152 U. S. 1, same case in State Court, 30 Pa. Rep. 157, would seem to be upon all-fours with the case at bar in this respect, except that the State of Oregon had granted such a license by statute while Alabama has not.

This case, which is perhaps the best adjudicated case to be found upon the subject, settles conclusively that there never has been such a thing as a right of wharfage as an incident to the title to the upland, except where the wharf is constructed under a license from the state, which license may be created either by statute or by usage; that a license from the state to the upland owner to erect wharves in front of his lands, whether established by statute or by usage, is revocable by the state at any time before its exercise; that it is competent for the state "to sell and convey away the shore, free of any right of the proprietor of the upland," and that a grant by the state of the shore, to any third person will operate as a revocation of a license to build wharves. This case is so thoroughly considered and contains such a thorough review of all of the authorities upon the subject, that it seems almost unnecessary to go further, It is to be observed, also, that the case of Dutton vs. Strong, 1 Black, 23; the Railroad Company vs. Schurmuir, 7 Wallace, 272; and Yates vs. Milwaukee, 10 Wallace, 497, all of which have been cited as authority for the proposition that an upland owner has a right to wharf upon a tidal stream, were fully reviewed by the Supreme Court in the later case of Shively vs. Bowlby, 152 U. S., 1, and held not to be authorities for this proposition.

The case of Morris vs. United States, 174 U. S., 196, while hard to read, is an undoubted authority for the proposition that the entire bed and shore of the Potomac River, having been vested in the state, a conveyance of the shore and bed of the stream by the state to the federal government conferred upon the federal government the right of accretions and of wharfage as against the owner of the upland; or, in other words, that a grant from a state to the United States government, precisely similar to the grant from the State of Alabama to the City of Mobile, in this case, cuts off the right of wharfage, and confers it upon the grantee of the state.

The case of St. Anthony Falls Water Co., vs. St. Paul

Water Comrs., 168 U. S., 349, the Supreme Court of the United States, following the case of Rundle vs. Delaware and Rariton Canal Co., 16 Howard, 80, expressly held that any license by the state to the upland owner, conferring upon him any riparian right, was at all times revocable by the state.

In the case of Hoboken vs. Penn. R. R. Co., 124 U. S., 690, the Supreme Court of the United States quoted with approval from the case of Stevens vs. Patterson and Newark R. R. Co., 5 Vroom (34 N. J. L.) 532, the following language: "That all navigable waters within the territorial limits of the state and the soil under such waters belonging, in actual propriety, to the public, that the riparian owners at common law has no peculiar rights in this public domain as incident to his estate, and that the privelege he possesses by the local custom or by force of the wharf act to acquire such rights can, before possession is taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark." Proceeding, the Supreme Court said: "It was, therefore, held in that case that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide water below the high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss."

In the case of Weber vs. Harbor Commissioners, 18 Wallace, 67, the Supreme Court of the United States said: "There is, therefore, no just foundation for the claim by the complainant as a riparian proprietor, of a right to wharf out into the bay in front of his land. He holds, as his predecessor took the land, free from any such appendant right. The erection of his wharf, the obstruction to the use of which is the cause of the present suit, was, therefore, not only an interference with the rightful

control of the state over the space occupied by it, but an encroachment upon the soil of the state, which it could remove with pleasure."

A better considered opinion is not often found upon any subject than that of Stevens vs. Patterson and Newark R. R. Co., 5 Vroom (34 N. J. L.) 537, in which the learned judge, after reviewing all of the authorities, and fully establishing that at common law the upland owner possessed no right of wharfage, whatsoever, and after referring to the long usage or custom which had prevailed in New Jersey to permit the upland owner to build out wharves, proceeded to say on page 545: "The local custom was nothing more than a license on the part of the public to the land owner, enabling the latter to fill in or wharf out along the fore shore between high and low water marks, and which licenses, when executed, become irrevocable. The shore owner acquired his indefeasible right by the acquiescence of the public in the performance of the act." That this was the view of the judges whose opinions prevailed in the decision of Gough vs. Bell is, I think, clearly manifest. I have above observed that the true doctrine with respect to this local custom is embodied in the opinion read in the Supreme Court by Chief Justice Green. In that opinion, this clear statement with respect to the necessity of the execution of the license, as a prerequisite to the acquisition of a legal right on the part of the land owner, is to be found, viz: "In New Jersey, as we have seen, the title of the state extends, as at common law, to high water mark as it actually exists. Where the waters have receded by alluvion or by the labor of the adjoining proprietor, the title of the state does not extend beyond the actual high water line. That every encroachment upon the shore or other part of the public domain may, at all time, be restricted or controlled by the legislature, is admitted!" This doctrine that the local custom amounts to nothing more than a license which is revocable at any time before its exercise, was fully reviewed in the case of Shively vs. Bowlby, 162 U. S. 1, and was there reaffirmed.

The case of Alexander H. Bevill vs. People of the State of Illinois, 177, Ill. 468; s. c. 43 Lawyers' Reports Annotated, 790, the Supreme Coure of Illinois thoroughly reviewed the question of wharfage, and unanswerably establishes that no such right exists.

In the case of Briggs vs, Pfeil, reported in the 25 Pittsburg Legal Journal, page 18, it was expressly decided that when the State, by statute, established the high water mark, and conveyed the shore and the soil under the river below the high water mark to the city the high water line as then established became the boundary line of the owner of the upland, and he took no right to accretions, because the right of accretions must be derived from the State, who owns the soil under which they are formed, and not as against the State without its consent.

The question which we are now discussing was fully reviewed in the case of Eisenbach vs. Hatfield, 26 Pa. Rep. 539, in an opinion which is well worth consideration in any court which is interested in the question, and in which the law is declared that the riparian proprietor's right to accretions not yet in existence, or to build wharves not yet constructed, are at all times revocable by the state; or, in other words, have no existence as against the State, but exist only in the form of a revocable license from the State.

The court in this case, after exhaustively reviewing the authorities, concludes thus, viz: "The result of our investigation of the authorities leads us to the conclusion that riparian proprietors on the shore of the navigable waters of the State have no special or peculiar rights therein as incidental to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good."

The whole question, including the right of the city to accretions, seems to have been decided as we contend, in the case of Sage vs. Mayor of the City of New York, 47 N. E., 1103.

We contend that the riparian rights must be derived from some one who owns them; they do not descend from the clouds upon the owner of an adjoining shore, but pass from the grantor whenever and only where the grantor owns them, and evidences his intention to convey them; where the United States Government of the State, or any other person, owns both the adjoining land and the riparian rights, they or it may convey the first to one person and the second to another, and thereafter the two became separate properties, and neither passes as an incident to the other.

City of Mobile vs. Eslaaa, 9 Port. 578; s. c. 16 Pet. 251.
Hoboken vs. Pa. R. R. Co., 124 U. S., 690.
Hagan vs. Campbell, 8 Port, 12.
Shively vs. Bowlby, 152 U. S. 28 and 35.
Goodtitle vs. Kibbe, 9 How. 474.
Howard vs. Ingersoll, 17 Ala. 792.
State vs. City of New Jersey, 25 N. J. L. 525.
Stevens vs. Patterson & N. R. R., 34 N. J. L. 546.
Hardin vs. Jordan, 140 U. S. 381.
Blanchwood vs. Porter, 11 Ohio, 138.
Kaukauna W. P. Co. vs. Green Bay Canal Co., 142 U. S. 254.
Musser vs. Hershey, 47 Iowa, 361.
Simmons vs. French, 25 Conn. 346.

The state may grant to any individual the right to so wharf out upon the shores in front of another's land without compensation to the latter. This is no violation of the riparian owner's rights.

(Mississippi.)—Martin vs. O'Brien, 34 Miss. 22.
(West Virginia)—Ravenswood vs. Fleming, 22 W. Va. 52.
(Washington.)—Eisenbach vs. Hatfield, 2 Wash. 236.
" Harbor Line Comrs. vs. State, 2 Wash. 531.

This must not, of course, be confused with the idea that the wharf after it has been constructed under an *existing* license, can be taken without compensation, for which we do not contend.

The right to wharf out rests upon passive or implied license merely. The State may regulate it, or even prohibit it.

(Wisconsin.)—Cohn vs. Wausaw Boom Co., 47 Wis. 302.
" Diedrich vs. R. R. Co., 42 Wis. 262.

(Washington.)—Eisenbach vs. Hatfield, 2 Wash. 236.
" Harbor Line Comrs. vs. State, 2 Wash. 531.

(Connecticut.)—State vs. Sargent, 45 Conn., 358.

(Iowa.)—Musser vs. Hershey, 47 Iowa, 361-2.

(New Jersey.)—Stevens vs. P. R. R. Co., 5 Vroom, 532.

Stewart vs. Fitch, 2 Vroom, 18.
Keyport, &c. Co. vs. Farmer's Trans. Co., 3 C. E. Green (N. J.), 511.

The right to reclaim the shore is a mere franchise.

Lockwood vs. N. Y. & N. H. R. R. Co., 37 Conn., 388.

The right of the owner of land bounded by navigable waters is revocable by the State, who may grant the right of accretions to a third person.

State vs. City of New Jersey, 25 N. J. L., 525.
Pa. R. R vs. N. Y., &c. R. R., 25 N. J. Eq., 158.
Stevens vs. Patterson and N. R. R., 34 N. J. L., 546.
Hardin vs. Jordan, 140 U. S., 381.
Hoboken vs. Pa. R. R., 124 U. S., 565.
Shively vs. Bowlby, 152 U. S., 35.

The question as to whether an abutting owner shall be permitted any riparian rights, whatever, is a question of State policy, subject at any time, to a modification, and where such rights are recognized, they arise from a mere license, which is revocable at any time before its exercise.

Shively vs. Bowlby, 152 U. S., 35.
Stevens vs. Pat. & Newark R. R. Co., 34 N. J. L., 539.
Conn. L. vs. N. Y. & N. H. R. R., 37 Conn., 388.
Musser vs. Hershey, 47 Iowa, 361.

The case of Pollard vs. Hagan, 3 Howard, 219, was an action in ejectment for a lot which had been formed by accretions, and the charge passed upon pointed out this fact, but it was, nevertheless, held that the title was in the State, and the grantees of the United States took no title.

Hallett vs. Beebe, 13 Howard, 25.
Pollard vs. Files, 2 Howard, 607.
City of Mobile vs. Eslava, 16 Pet., 251.

Indeed, it seems to be definitely and distinctly settled that the State may deprive the adjoining owner of all riparian right not already exercised, whether accretions, wharfage, or otherwise.

Shively vs. Bowlby, 152 U. S., 1.

In Pollard vs. Greit, 8 Ala. 949 (top of page), it was held that the United States, as proprietor of adjoining soil, did not obtain accretions after having conveyed bed of stream to State. So, in

Pollard vs. Files, 3 Ala., 31.
Kennedy vs. Beebe, 8 Ala., 914.

In Gould on Waters, Sec. 157, it is said that city, being owner of quay or river bank; is entitled to accretions.

Title of State and power of disposition is supreme.

Morse vs. O'Connor, 34 Pac. 426.
Hardin vs. Jordan, 140 U. S., 381.
Manchester vs. Mass., 139 U. S., 240.
Bowlby vs. Shively, 30 Pac. 154.
Eisenbach vs. Hatfield, 26 Pac.; 539.
State vs. Board, 27 Pac., 550.
Knights vs. U. S. Land Co., 142 U. S., 183.

The riparian owner had no right to wharf out at common law.

(California)—Coburn vs. Ames, 52 Cal. 398.
Gould on Waters, 167-9.

A wharf erected on navigable tide water, while not necessarily nuisances, are purprestures, and if the title to the soil thereunder is in the State, the title to the wharf will likewise be in the State.

Coburn vs. Ames, 52 Cal. 397.
People vs. Davidson, 30 Cal. 389.
State may maintain ejectment for such wharves.
Coburn vs. Ames, 52 Cal., 398.

It has been held that it is competent to permit a corporation to construct wharves and thereby shut off the riparian owner.

Kohn vs. Wausaw Boom Co., 47 Wis 34-5.

We take it, therefore, that the following propositions are settled by the authorities above cited:

1.—That there is no common-law right of wharfage which can be obtained as a right from the United States government after it had parted with the title to the shore by the admission of the State into the Union, and that whatever right of wharfage exists must be derived from the State.

2.—That in Alabama there has never been a statute or a grant conferring the right of wharfage, and that the only case upon the subject is the case at bar holding that no such right exists.

3.—That the right of accretions, like the right of wharfage, is a right which belongs to the owner of the shore, and may by him be separated from the upland. That if, by any established custom in Alabama, the right of accretions over the shores belonging to the State or the right of wharfage thereover had been permitted to the upland owner, this would have been a mere franchise or a license which is revocable at any time before its exercise.

4.—That in this case the license, if there was any, had been revoked by the grants of the shore, and soil under the waters, to the city, before the acceptance, and before the accrual of any accretions.

In speaking of this subject, and quoting from the decision of the Supreme Court of Alabama in the case of Mayor of Mobile vs. Moog, *supra*, Judge Toulmin has, in the matter of the Sullivan Timber Company vs. City of Mobile, observed that "the purpose of the Act of January 31, 1867, was to transfer the right of power of the State in and over the shore of the river and soil under it in front of Mobile to the city, to be exercised by it as a State should exercise them for the general good in preventing the general navigability of the river being impaired, and in restraining purprestures along the river front below high water line by prescribing the manner in which the purprestures should be built into or over the water." If the learned judge intended, by what he said in this opinion, to hold that this statute did not confer upon the City of Mobile the right of posses-

sion to the shore and water bed even prior to the erection of any wharves thereon, his opinion is diametrically opposed to the opinion of the Supreme Court of our State, by which he expressly declares himself bound and announces his intention to follow, and by which, upon repeated decisions of the Supreme Court of the United States already cited, he is conclusively bound. If the grant stood wholly upon the act of January 31, 1867, and if the construction which Judge Toulmin has placed upon that act was indisputable, the inquiry would remain whether the State or the State courts, much less the federal courts, could dictate the policy to be pursued by the city in its performance of the trust, after the legislature had transferred the trust from the State to the city for the apparent reason that the city authorities are in a better position to determine what wharves should, and what wharves should not, be built, than the legislature of the State. There would be no ground upon which the courts could say that the city could not take possession of the shore, and water front, and prohibit the construction of wharves by private owners, which would not likewise deny to the State this power, which has by all the authorities and by numerous decisions of the Supreme Court of the United States, been fully accorded to the State. Not only this, but if the city, in the absence of an action on the part of the abutting owner, were helpless to take possession of the wharves and water front and construct its own wharves, or authorize third persons to do so, then the abutting owner, may (as they have attempted in this instance to do), continued to hold a large portion of the water front wholly unimproved to the detriment of commerce and the growth of the city. It is probably for this reason that the policy pursued by Alabama in transferring the possession of its water fronts to the city has addressed itself to nearly all of the states having large ports. Washington, for instance, as will appear by an examination of the case of Morris vs. United States; in St. Louis, New Orleans, as will appear from the famous Batteau cases; San Francisco,

Chicago and New York—have all been vested with the title and control of the water front

But the case does not rest upon the act of January 31, 1867, for on the fifth day of December, 1896, the legislature passed another act (which has been wholly ignored by Judge Toulmin in his opinion), in which the legislature of the State expressly declared that the title to this property should be vested absolutely and unconditionally in the city, "to be held, maintained, controlled and disposed of as to it may seem best."

We have gone to great pains to establish that any license to wharf which might have been granted by the State could have been revoked by the grant from the State to the city, and that any license by the city would have been revoked by the suit in ejectment. There never was, however, such a license granted, as we have attempted to show.

ESTOPPEL.

The plaintiff in error sought to prove by certain witnesses that they had driven certain pilings in front of these lands, but this testimony was excluded by the trial court. The plaintiff in error now contends, as we understand, that it should have been permitted to introduce this proof, upon the theory that the State of Alabama had extended to it a license to build a wharf, and that it had accepted this license, and that it became irrevocable after its acceptance and the construction of the wharf. We desire to discuss this contention; but it must at the same time be remembered that the offer of evidence in this case was not an offer to show that there was a wharf in front of the property at the time that the suit was brought, or that any wharf had been erected thereon prior to the revocation of any license that might have existed by the conveyance of the shore from the State to the City on January 31st, 1867; nor was there any evidence, whatsoever, that the State of Alabama had ever granted to it or to any other person a license to erect such wharf, nor had any such policy on the part of the State ever been recognized either by the Act of its General Assembly or by a decision of its courts.

In the case of Shively versus Bowlby, 152 United States, page one, and in the cases therein referred to, it was assumed, if not decided, that if an abutting owner should erect a wharf under a license, express or implied, from the State the State could not thereafter revoke, the license and destroy and take from the abutting owner his wharf without compensation. If this doctrine be sound, it must inevitably rest upon the principles of equitable estoppel, and these principles we shall proceed to discuss. Even if we should concede, however, that there was an equitable estoppel against the defendant in error from maintaining an action of ejectment against the plaintiff in error by reason of its having exercised a license, this could not present a federal question for the reason amongst others, that while estoppel may be introduced in the United States courts, as a defense to an action of ejectment, (Dickerson vs. Colgrove, 100 U. S., 578; Kirk vs. Hamilton, 102 U. S., 68), this is not the practice of the State courts in Alabama, but in that State an equitable estoppel cannot be availed of in an action of ejectment, but must be enforced by a bill in chancery.

Hawkins vs. Ross, 100 Ala., 463.
McLeod vs. Bishop, 110 Ala., 640.
Goodman vs. Winter, 64 Ala., 410.
Opinion of the Supreme Court in the case at bar.

The denial, therefore, of the right of the plaintiff in error to establish an equitable estoppel in an action of ejectment, was not a denial of any right, but involved a mere question of practice, which is not subject to review in this court.

But, besides this, an error, in the judgment of the Supreme Court of Alabama, as to the existence *vel non* or the application of an estoppel, would not, of course, constitute a want of due process.

But even if an estoppel existed and could be availed in an action of ejectment, as is supposed by the plaintiff in error, it would be a grave misapprehension to suppose that because the owner of the land has induced the erection of improvements thereon by a third person, or the expenditure of money in any

other way under the belief that this title was perfect or upo
any parol license, that there would arise an unconstitutiona
estoppel against suing for the land itself. We know that th
doctrine of estoppel has, on some occasions, been stated thu
broadly and indiscriminately, but not where the limitation whic
we are about to suggest has been considered and passed upo
The whole basis of the idea of estoppel rests upon commo
justice, and the doctrine is that if the owner of land wrongfull
induces third person to expend his money either in purchasin
the title or in the erection of wharves or other improvement
thereon, upon the faith of the license, he cannot recover the lan
*without returning to the person thus induced to expend his money, th
money which he has so expended or the reasonable value of the im
provement as it then exists;* for instance: "I own a tract of lan
worth $10,000, and I wrongfully induce my neighbor to believ
that it is his land, or that I will not revoke a parol licens
which is void under the statute of frauds, and he thereupo
erects a shed thereon worth $100. Perhaps I should not b
allowed to oust him from the property without offering him hi
$100 or what the improvements were worth at the time that
sought to take possession. This would be just and therefor
equitable. But could he, on the other hand, enjoin me from re
covering my land, even though I paid him the amount which h
had been thus misled into expending. This would be the doc
trine of forfeiture; not of equitable estoppel. It results, there
fore, that the remedy of the plaintiff in error, if he has built a
wharf under a license before it was revoked, is to file a bill in
chancery seeking to enjoin the action of ejectment until the
present value of its improvements has been returned to him, and
offering, on its part, to do equity by surrendering the possession
of the land and paying the proper rent therefor upon being com
pensated for his improvements at their present value. O
course, if the wharves or other improvements have been con
sumed by their use, so that they are not now worth what they
cost, the amount to be refunded would be their present value.

This would necessarily be the case, since otherwise it would result that when one man erected perishable improvements upon the property of another, he might entirely consume his improvements by their use, and thus derive the whole benefit thereof to himself, and yet demand from the owner the value of that which he had himself consumed. Let us illustrate. The plaintiff in error may have expended $50,000 in the erection of wharves upon the defendant in error's property, they may have held possession of these wharves and rented them for their own benefit until they rotted down; is there any rule which would say that the defendant in error must pay to the plaintiff in error the original cost price of the wharves which had already been consumed by their use, as the condition to taking away from the plaintiff in error the possession of its property, simply because the plaintiff in error had already been allowed to enjoy the use of the property for a number of years, and at one time during this use, had improvements thereon? The reasoning is identically the same whether the wharves have been entirely consumed by their use, or whether they have simply deteriorated on account thereof. Upon this subject, the Supreme Court of Alabama has said: "Estoppels are protective only, and are to be invoked as shields and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the person in whose favor they arise, and they should not, in any case, be made the instrument of gain or profit.

Lindsey vs. Cooper, 94 Ala., 184.
Dickerson vs. Colgrove, 100 U. S., 580.

That the limit of the estoppel is that the owner may not oust the person making the improvements without compensating him therefor, seems to be clear.

Cowan vs. Southern Rwy. Co., 118 Ala., 561.
St. Louis vs. Green, 13 Fed., 213.

Steel vs. Smelting Co., 106 U. S., 456.
Green vs. Biddle, 8 Wheaton, 1.
Leighton vs. Young, 52 Fed., 442.
Canal Bank vs. Hudson, 11 U. S., 82 and 83.

In order to uphold the position that if the owner of land wrongfully induces another, by his failure to assert his title, to expend any sum whatever, in improving the land, though it be $10, the owner of land loses his entire title, and the investor of the $10 acquires the entire estate, although the property be worth a million, Judge Toulmin in the opinion already referred to refers to the case of the New Orleans and South Railroad Company vs. Jones, 68 Ala., 49; and the South and North Railroad Company vs. The Alabama Great Southern Railway Company, 102 Ala, 236. We find no difficulty, whatever, in reconciling these cases with our insistance that the estoppel runs so far only as to impose upon the owner of the land the necessity of compensating for the expenditure, before taking possession. It must be remembered, of course, that the railroad company who appropriated the land in question in these cases had the absolute right to do so by an ad quod dandum proceedings upon a payment of the value thereof to the owners. All that the owner, therefore, was entitled to was compensation for his land, and not to the land itself, and that the owner of the land was not estopped from proceedings against the railroad company for the value of the land, is thoroughly settled in the case of Cowan vs. Southern Ry. Co, 118 Ala., 561.

It follows, therefore, that where the party taking possession has the right to the land upon the payment of compensation therefor, he must compensate the owner even though he has been permitted to place his improvements thereon upon the faith of his ownership; and where he has no right to subject the land upon the payment of the value thereof; he must surrender the possession thereof upon being compensated for the money which he has been wrongfully induced to spend.

We take it, therefore, that even if the mere exercise of a license by the building of improvements upon land constitutes an equitable ground for enjoining an action of ejectment, or a writ of restitution thereunder, until the owner of the land has compensated the licensee for monies expended on the faith of the

license, or rather for the then value of the improvements put by the licensee it does not transfer the legal title, or constitute any just defense to the action of ejectment, irrespective of the proportion which exists between the value of the land and the amount of the improvements, and it is due to the inflexibility of the common law remedy which renders it unable to mold the remedy according to the circumstances, which has led the Supreme Court of Alabama and the majority of the other courts to hold that an estoppel must be taken advantage of by bill in equity, and not as a defense to an action of ejectment. It is, also, in this particular worthy of note, that a number of the states have enacted statutes providing for compensation for improvements under actions of ejectment, which statutes grow out of the considerations which we have just discussed.

We are aware of the authorities holding that a license when acted upon cannot be revoked without a return of the money expended on account thereof and we have discussed their scope; but the whole doctrine is, we think, untenable.

Speaking of this line of cases, it is said in Brown on Statutes of Frauds, Section 31, that, "In some of the earlier decisions, both English and American, the licensee was protected against revocations on the ground that the licensor was estopped to revoke a license on the faith of which the licensee had incurred expenses, but it is now well settled that the doctrine does not apply inasmuch as a licensee is bound to know that his license is revocable and that in incurring expenses, he acted at his own risk and peril. Courts of equity have also repeatedly declined to interfere on this ground."

In Jones on Easements, Section 6, it is said: "Although there are numerous decisions which hold that in equity a parol license becomes irrevocable, after the licensee has expended on the faith of it, these decisions are opposed to sound law, and to the weight of authority both in America and in England."

Speaking further on this subject, and quoting from a recent

decision, the author says: "The fact is that the statute that renders legal the revocation of certain classes of contracts, is founded on the theory that while by its force great loss will many times fall upon promisees, nevertheless such loss must be endured by such sufferers in order that the mass of the community shall be protected against worse disasters." In the foot note of this text will be found collated a number of authorities in each of the following states, that uphold our position: Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Rhode Island and Wisconsin.

The best collation of cases which we have found is in the note to Lawrence vs. Springer, 49, N. J. Eq., 289; s. c. 31 Amer. St., 715, where the author observed that while there are two lines of authorities upon the subject, "The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor while it justifies anything done by the licensee before the revocation, is revocable at the option of the licensor, and that although the intention was to confer a continuous right, and money had been expended by the licensee upon the faith of the license * * * such license could not be changed into an equitable right on the ground of an equitable estoppel.

The justice of these cases results from the fact that a licensee takes the license with the knowledge that it is revocable at any time. The fullest discussion of this matter, upon either side, which has come to our observation, is the case of the Great Wall Water Company vs. The Great Southern Railway Company, 54 Pacific Rep., 965, where the authorities upon the subject, both English and American, are fully reviewed, and where it is said that the great weight of authority is in favor of the absolute and unqualified power of the licensor to revoke the license irrespective of the amount of the expenditure by the licensee, and that the result in law and equity is the same. Of this matter,

the court, in the case last cited, 54 Pa. Rep., 967, quoting from the case of Crosdale vs. Lanigan, 129 N. Y., 604, same case, 29 N. E., 824, said: "It is quite immaterial in result that this interest claimed, if it existed, is equitable and not legal. An incumbrance has been erected upon defendant's lot, and his ownership to the extent of such interest has been divested. We are of the opinion that this judgment is opposed to the rule of the law established in the State. There has been much contrariety of decision in the courts of various states, and jurisdiction. But the courts of this State have upheld with great steadiness the general rule that a parol license to do an act on the lands of the licensor, while it justifies anything done by the licensor before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right and money had been expended by the licensee upon the faith of the license.

"This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles which are most important to be preserved against defects and provocations not founded upon solid instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood and is indisputable, but to change what commenced in a license into an irrevocable right, on the ground of estoppel is another and quite a different matter. It is far better, we think, that the law requiring interest in land to be evidenced by deed, should be observed, than to leave it to the chancellor to construe an executed license as a grant depending upon what in his view may be equity in a special case."

In the case of Cronkhite vs. Cronkhite, 94 N. Y. (Sickles), 323, which was a bill in equity, it was held that the use having begun in the parol license was revocable, and that the fact that the consideration had been paid for the permission did not make

it irrevocable, and that the licensor was not prevented from asserting his right to revoke by equitable estoppel. In the note to this case, as reported in the New York Court of Appeals Reports, 19, page 699, a large number of authorities are there cited.

In the case of Pitzman vs. Boyce, 111 Missouri, 387, s. c., 19 S. W. Rep., 1104, which was a bill in equity, the court, quoting from Bigelow on Estoppel, (6 ed.) Secs. 666-7, said. "Some of the courts indeed deny the right of the parol licensor even to revoke the license after outlay under it; resting the case on the ground of estoppel in pais, or treating the situation as equivalent to part performance by parol agreement for the sale of an interest in real estate. But the better view in presence of the Statute of Frauds, appears to be that so far as the question of further enjoyment is concerned, the license may be revoked though no action can be maintained against the licensee, for what he has been induced or led to do."

After quoting from the case of the National Stock Yards against Wiggins Ferry Company, 112 Ill., 384, it is said: "To say that the license is irrevocable, because the thing permitted to be done, necessarily involved an expenditure of money would be going beyond the most extreme views of the subject, and make most licenses irrevocable. The practical fact of such a doctrine would be to make most licenses convevances of an interest in land by mere estoppel in pais." The case thus quoted holds explicitly that the expenditures of money does not constitute an estoppel in equity.

In the case of Lawrence vs. Springer, 24 Atlantic, 936, the court of errors and appeals of New Jersey said: "A copious collection of such authorities will be found in the 13th Amer. and Eng. Encyc. of Law, title 'License', p. 550, and in the text of that work it is declared that in most of the states it has been held that even where money has been expended by the licensee on the faith of the license, the licensor may exercise his power of revocation. Indeed, Professor Pomeroy, himself, though his

work on specific performance is cited by the Vice Chancellor in support of the doctrine of irrevocability of this kind, after referring to such principle as prevailing in certain jurisdictions of this country, concludes with the decided declaration, that "The rule is undoubtedly opposed to the common law doctrine, as it prevails in English and American states."

The case of Jemieson vs. Millerman, 3 Duer, (N. Y.) 255, is of peculiar interest.

In the case of Lawrence vs. Springer, 49 N. J. Eq., 289, s. c. 31 Amer. State Repts., 711; there will be found able and exhaustive discussion on this subject, holding that there is not in the courts of chancery an equitable estoppel against such revocation. The same thing has been decided in the following cases.

7 Wait's Actions and Defenses, 206, and citations.
Minneapolis Mills Co. vs. Min. St. L. R. R. 51 Min. 304; 53 N. W., 689.
Minn. W. Ry. Co. vs. Minn. St. L. Ry. Co., 58 Minn. 129; 59 N. W., 983.
Hodgins et al. vs. Farrington, 150 Mass. 19; s. c. 22 N. E., 73
Fabian vs. Collins, 3 Mont., 215.
Hathway vs. Y. W. L. & P. Co., 15 Wash., 469.
Johnson vs. Skillman, 29 Minn. 95; s. c. 43 Am. Rps. 192; 12 N. W., 149.
Cronkhite vs. Cronkhite, 94 N. Y., 323
Beck vs. L. N. O. & T., 65 Miss., 172.
Tanner vs. Voluntine, 75 Ill., 625.
Collins Co. vs. Marcy, 25 Conn., 239.
Wood vs. Mich. R. R., 80 Mich., 334.
Bobcock vs. Utter, 32 Haw. B., 439.
Davis vs. Townsend, 14 Barb. (N. Y.), 333.
Peoples vs. Godwin, 5 N. Y., 568.
Whitaker vs. Cawthon, 3 Dey (6 N. C.) L., 389.
Greely vs. Stillson, 27 Mich., 153.
March vs. Bellew, 45 Wisc., 36.
Sovereign vs. Ortman, 47 Mich., 181.
Spalding vs. Archibald, 52 Mich., 365.
R. & D. R. R. vs. D. & N. R. R., 104 N. C., 658.
Benedict vs. Benedict, 5 Day (Conn.), 468.
Houghtaling vs. Houghtaling, 5 Barb., 383.
Cook vs. Stearns, 11 Mass., 533.

Stevens vs. Stevens, 11 Met. (Mass.), 251.
Miller vs. Auburn & S. R. Co., 6 Hill (N. Y.), 61.
Hayo vs. Richardson, 1 Gill & J. (Md.), 366.
Wright vs. Freeman, 5 Harr. & J. (Md.), 467.
Clute vs. Carr, 2 Wisc., 531.
Fryer vs. Warne, 29 Wisc., 511.
Moulton vs. Fought, 41 Me., 297.
Pitman vs. Poor, 38 Me., 237.
Houston vs. Saffer, 46 N. H., 505.
Dodge vs. McClenstock, 47 N. H., 383.
Jameson vs. Milleman, 3 Duer (N. Y.), 255.
Wingard vs. Tuft, 24 Ga., 179.
Land vs. Miller, 27 Ind., 534.
Cook vs. Pridgen, 45 Ga., 331.
Williamston & T. R. R. vs. Battle, 66 N. C., 540.
Cumberland Valley R. R. vs. McLannahan, 59 P. A. St., 23.
Tufts vs. Copen, 37 W. Va, 623.
Hetfield vs. G. R. Co., 29 N. J. Law., 571.

Even if the case were such as would estop a private owner of the property from disputing the right of the plaintiff in error, it would, by no means, follow that the city would be estopped from asserting its title to public property.

City of Mobile vs. L. & N. R. R. Co., 124 Ala, 132; 26 So. Rep., 905.
Meriwether vs Garrett, 102 U. S., 511-3.
Herman on Estoppel, Sec. 1222, pp. 1365-6.
Jersey City vs. Amer. Dock & Imp. Co., 23 Atl., 682.

The distinction between private and public property is clearly set forth in the opinion of the Supreme Court of the State in the case at bar. It has already been decided in the case of the City of Mobile vs. L. & N. Railroad Company, 124 Ala, 132; 26 So. Rep, 905, that the City of Mobile could not under its charter divest itself of its title to the property by a direct grant or license, and that which it cannot directly, it cannot, of course, do indirectly.

Indeed, it is said in Webb vs. Demopolis, 95 Ala., 135, that it is doubtful whether a municipal corporation can ever be estopped by any act, whatever, as to its public property, and we think it is now well settled that it cannot.

Jackson Co. vs. Derrick, 117 Ala., 365.
Jersey City vs. Amer. Dock & Imp. Co., 23 Atl., 682.
State vs. Brewer, 64 Ala., 287.
United States vs. Kirkpatrick, 9 Wheaton, 720.
Galveston H. and S. R. R. Co. vs. State, 36 S. W., 115-6
Day Land & Cattle Co. vs. State, 4 S. W., 878.
Reed vs. Birmingham, 92 Ala., 339.
Jersey City vs. Canal Co., 1 Beasely (N. J.), 547.
Cross vs. Mayor, 18 N. J. Eq., 312.
Com. vs. McDonald, 16 George & R. 390; 13 Ill., 60.
Alleghney Co. vs. Parrish (Va.), 25 S. E., 882.
Rund vs. Fowler, 41 N. E., 456.
Freeport St. Ry. Co. vs. Freeport, 38 N. E., 137.
New York vs. N. Y. Cen. & H. Co., 23 N. Y., 562.
Wilkinson vs. Meridian, 69 Miss., 288.
Mary Lee Coal Co. vs. Winn., 97 Ala., 495.
I. C. Ry. Co. vs. Illinois, 146 U. S., 387.
Brown vs. Morris, Co. & B. Co., 27 N. J. L., 650.

THE PAYMENT OF TAXES IS NOT MATERIAL.

The 25, 26, 27, 28, 32 and 34 assignments of error complain of the refusal on the part of the Supreme Court of Alabama to reverse the judgement of the trial court on account of its refusal to admit the evidence in regard to the payment of taxes by the plaintiff in error to the City of Mobile. These assignments present no federal question whatever. If we lay aside the objection that some of the questions call upon the witness to state the effect of assessments which were in writing, and which he was not competent to construe, and the fact that the tax bills offered in evidence did not show, or tend to show, that the real estate therein referred to was the real estate which was the subject matter of the litigation, we would be confronted on the threshold of the question, with the proposition that although in the federal courts an equitable estoppel can be availed of in defense in an action of ejectment, this is a question which does not involve the rights of the parties, but the jurisdiction of the court, or the form of the remedy, and the decision of this question in this particular case was not based upon the question as to whether there was, or not, an equitable estoppel, but upon the

well-established doctrine that in the State courts the benefit of an estoppel cannot be obtained in a court of law in an action of ejectment. Even if the plaintiff in error had the right of estoppel which it asserts it has not been deprived of its rights by the decision in this case, it is at liberty to obtain the advantage thereof by a proper bill in equity.

But the payment of taxes to the city upon the property in question would not have constituted an estoppel.

In the first place, the principle of estoppel, as we have already had occasion to point out, rests upon the fact that one party has misled the other by representations to that other; it has no application, whatever, where the information of both parties is the same. The law of taxation makes it the duty of a citizen to give in his property for assessment, and not the duty of the government to hunt it up and point it out to him; so that, if the property had been assessed for taxes, it would have been a representation by the party making the assessment, and not a representation by the government to him in regard to the question of title. Besides this, it is well known that the assessments by the city are copied from the assessment of the State and county, as a matter of law. It is asserted in one State—we believe in Iowa—that a city will be estopped from asserting its title to public property, by reason of having sold it for taxes under a private assessment. The estoppel in these cases, however, was in favor of the purchaser under a sale by the city. This is a very different question from that as to whether the city would be estopped as against the party who had paid the taxes. In one case the elements of estoppel are present, for the city sold the property under the assessment as the property of the taxpayer, in the other, they are not. However, this may be, the question seems to have been directly decided in a great many cases.

Simplot vs C. M & St. Paul Ry., 16 Fed., 365.
Herman on Estoppel and Res. Adj. (Vol. 2), Sec. 1222, p. 1365.
St. Louis vs. Gorman, 29 Mo., 593.

Walcott vs. Swampscott, 1 Allen, 101.
McFarland vs. Kerr, 10 Bosw., 249.
Rossire vs. Boston, 4 Allen, 57.
Buttrick vs. Lowell, 1 Allen, 172.
Kimball vs. Boston, 1 Allen, 417.
Reynolds vs. Newton, 14 Ohio; S. C. 433.
Meyers vs. Toledo, 9 Ohio, C. D., 676.
Ellsworth vs. Grand Rapids, 27 Mich., 250.
La Ice Man. Co. vs. City of N. O., 9 So., 21.
Jarvis vs. Lynch, 52 N. E., 657.

Neither the State nor any of its governmental subdivisions can be estopped by the laches of its officers.

United States vs. Kirkpatrick, 9 Wheaton, 735.
State vs. Brewer, 64 Ala., 287.
Jackson Co. vs. Derrick, 117 Ala., 366.

Indeed, it was said in Webb vs. Demopolis, 95 Ala., 135, that it is doubtful whether a municipal government can ever be estopped by any act, whatever, as to its public property.

Dillon on Mun. Corp. (Fourth Ed.) Vol. 2, Sec. 671, p. 801.

Indeed, it has been decided that a city cannot be estoppped by the acts of its agents.

Galveston H. & S. R. R. vs. State, 36 S. W., 115-6.
Day Land and Cattle Co. vs. State, 4 S. W., 878.

So far as the taxes assessed in favor of the State are concerned, it has frequently been held that the doctrine of estoppel does not operate against the State.

Hermann on Est. and Res. Adj. Sec. 1128 (Vol 2.)
Wallace vs. Maxwell, 10 Ired. N. C. L., 110.
Taylor vs. Crawford, 4 Haws. (N. C.), 116.
Chandler vs. Lunsford, 4 Deb. and D. (N. C. L.), 407.

The plaintiff in error has contended that certain statutes establishing a harbor commission with power to establish a harbor line for the Mobile River must be construed to defeat the right of the city to the lands in question. We shall attach, as Exhibit "A" to this brief, a copy of so much of said act as is material to this discussion.

THE HARBOR LINE STATUTE DOES NOT AFFECT THE QUESTION.

We have not been able to understand whether the contention as to the effect of the act establishing the Mobile River Commission is that it wholly divested the City of Mobile of its title to the shore and bed of the river, or that it simply authorized the Mobile River Commission to grant licenses to particular applicants, leaving the title to the balance of the shore upon which no wharves were erected, still in the City of Mobile. We think that it is clear that neither effect can be attributed to the act and that the whole scope and purpose of this act was that of a police regulation, intended to facilitate commerce by protecting navigation; that the jurisdiction of the Mobile River Commission is to prescribe the manner in which docks, wharves, etc., may be erected by those having right to control the shore; that the act makes no change in the title to the property, nor does it authorize the commission to license one individual, or corporation, to erect any structure upon the property of another individual or corporation, whether private or municipal. In short, that it confers no right of wharfage, but only regulates or restricts the exercise of that right by him in whom it is already vested, whether that be the city as the owner of the shore or the upland proprietor. There are statutes in some states which provide in terms that the upland proprietor may wharf out over the shore which is the property of the state, but these are not to be confused with that class of restrictive statutes to which the present belongs, and which only provide that it shall not be lawful for those having the right of wharfage to wharf beyond a certain point or except in a certain manner—restrictions established for the protection of navigation.

Our position in this matter is not without ample support from the authorities, as will be shortly demonstrated. The learned judge of the United States Court, in the case of Sullivan Timber Company vs. City of Mobile, declining all reference to

the many authorities construing similar acts all over the country, disposes of the matter thus: "It seems to me clear that when the State of Alabama and the City of Mobile concur in saying *to any person who proposes to build or extend a wharf or structure* into the channel of the Mobile River, that it should be unlawful for *him* to do so unless he conforms to certain rules and regulations, they virtually say to him, if he constructs his said structures in conformity to the rules and regulations, it shall be lawful for him to do so." If we concede the premises assumed, no one would perhaps question the reasoning by which the learned judge has reached the conclusion announced. The premises assumed are that by a proper construction of the acts and ordinances referred to, the State and City have made such a statement to the *abutting owners upon the Mobile River*. Whether such is the proper construction of these statutes and ordinances is the only question ever argued upon this point, and to take the only subject matter of dispute as the admitted premises upon which to base an argument, is but to beg the question. We shall attempt to show that in perhaps nearly every State and City in the United States where there is a navigable water, there prevails a similar statute; that these statutes have for their exclusive purpose the protection of navigation; that they do not confer upon any person a right of wharfage, but merely regulate the exercise of that right by whomsoever may possess or acquire it; that they do not, as Judge Toulmin assumes, say to any person, you may appropriate the right of wharfage over any portion of the shore you may select regardless of all questions of ownership in the shore or soil, but say simply that the right of wharfage shall be exercised by the owner thereof only in a particular manner.

The question presented is as to the purpose of the statute, whether to confer a new right or to restrict the use of a right already existing. The language of the statute itself seems to us to be conclusive, even if we knew nothing of its history and purpose, and even when we ignore all of the authorities upon the

subject, as was done by the district judge in Sullivan Timber Co. vs. City of Mobile.

The language of the act of the legislature is very distinctive, and is that "no one shall erect or place any bulkhead, wharf, boom, dry dock, or similar structure in any of the ways mentioned in the fourth section of this act, without first making application in writing to said commission, which application shall describe the nature and exact location of such proposed structure, giving specifications," etc. This much of the act, only when construed alone, is not wholly irreconcilable with the theory that the act intended to confer upon the commission the power of conferring a license, but it is wholly irreconcilable with the idea that the act intended itself to confer the license upon any person other than the owner, and we shall hereafter discuss the question as to whether it conferred upon the commission any power to pass upon the right of the applicant to wharf out or to confer any right that did not already exist. Let us look, however, into the history and the purpose of the act, as well as at the authorities upon the subject.

The grant of 1867 from the State to the city included not only what is at present the shore and bed of the Mobile river, but also the lands which were at that time a part thereof, and which had become dry land above the high-water mark at the time of the passage of the act incorporating the Mobile River Commission. This later act makes no reference whatever to this land or to the grant to the city. Had it been the intention of the legislature to revoke the whole grant, some reference would, of course, have been made to the grant intended to be revoked, or to the lands covered thereby, and if it had been the intention to revoke the grant as to part of the land and not to the other, some method would surely have been established by which the two parts could be separated, or identified. And yet, not the remotest reference to this land or grant can be found in the act which is said to have been intended to affect the revocation of the grant. Indeed, it will be seen that the act expressly

declares that "It shall not be construed to authorize the commisson to demand, receive or collect . .... anything from any person or corporation."

Part of the shore along the river over which jurisdiction is conferred upon this commission, is owned by the State of Alabama, part by private individuals, and part by the City of Mobile. It will be observed that identically the same power is given, in identically the same language, as to each class of property, which would certainly indicate that the intention was not that the commissioners were, by their act, to confer valuable rights in one class of property, while as to the other class, it can confer no rights whatsoever.

It is to be observed that no machinery whatever is provided for the hearing or a trial between the parties who assert conflicting claims to the property, and that no power is conferred upon the commission to decide between such claimants, which, of course, indicates that the powers of the commission were not to confer rights or to grant licenses, but that it was limited to the power to regulate the use of property by the owner, and presupposes the ownership of the property in the party who assumed to wharf. If it were the intention that this commission should pass upon the question of title, some provision would be necessary for a hearing by the parties in interest, and, under our constitution, for a trial by jury.

Brown vs. Morris Canal and Bank Co., 27 N. J. L, 650.

If it was the intention to grant a license over the city's property, was it the intention to authorize the commission to grant a license to an adjoining owner, or to any third person? It would seem to be impossible to suppose that it was the intention to confer the right to grant the license to any stranger without any provision being made for an investigation into the question of the policy of such a license, and if it was the intention to grant the right only to the abutting owner, some provision would have been necessary for the machinery to determine who the abutting owner was.

It will be observed that the same fee is charged to all who apply for the right to wharf out. It will be observed that this fee is identically the same whether the wharf is to be erected on private property acquired in the shore before Alabama became a member of the Union, or upon the city's property, and that this fee is to go, not into the city's treasury, but into the treasury of Mobile county. This would seem to indicate that it was not intended to grant a license over the city's property, but that it presupposes that the party who erected the wharves should obtain the right from whomsoever it belonged, and should pay the fee as a contribution to the expenses of maintaining the River Commission and performing its duties.

It will be observed that the act gives the commissioners no powers whatsoever to sell any property, or to obtain any consideration therefor, or to give any evidence whatever of a grant by it, which are themselves circumstances which seem to us to be entitled to considerable weight in the construction.

It will be observed also that the caption of this act reads; "An act to incorporate the Mobile River Harbor Commission, and to define its powers." If the body of the act is to be construed as undertaking to grant away the title of the City of Mobile to its public streets, highways or water front, the act is unconstitutional, because the purpose of the act is not embodied in the title.

City of Mobile vs. L. & N. R. R. Co., 124 Ala., 132, 26 So. Rep., 905.

And it will not be contended, we presume, that the courts will unnecessarily place a construction upon an act which would render it unconstitutional.

City of Mobile vs. L. & N. R. R. Co., 124 Ala., 132, 26 So. Rep., 905.

It is to be remembered, also, that a part of the property which was granted to the City of Mobile, had, prior to the creation of the Mobile River Commission, become highland, and no longer formed a part of the shore. Was it the intention to

convey away this land from the City of Mobile, and place it in the commission? Such must have been the intention, if the act confers the right upon strangers to erect wharves to the channel line over the city's property, and yet the language of the act itself prohibits such a construction, since the jurisdiction is confined to the river as it existed at the passage of the act.

The history of this act throws great light upon its proper construction.

Commonwealth vs. Alger, 7 Cush. (Mass.), 82 *et seq.*

Similar statutes have been enacted all over the country. And it has been said by the Supreme Court of the United States, in the case of Packett Co., vs. Catlettsburg, 105 U. S., 563, there is probably not a city in the United States fronting on a navigable stream where a similar regulation of navigation has not been established. This legislation began by the enactment of the city ordinance prior to the time when the City of Mobile had obtained its title to this water front. The channel line will be found marked upon the map by P. J. Gaillard of 1866.

The first ordinance will be found in the Municipal Laws of Mobile of 1858, which was simply an ordinance providing "that, no wharves nor any other structure shall be built or constructed, or extended, etc., beyond a certain designated channel line." Finding that the machinery for preventing the infringement of this rule was insufficient, an ordinance was adopted in 1852, which was to the same effect, except that it required the owner of the land to obtain a permit from the Civil Engineer of the city before their erection, very much as it is required of the owner of every city lot to obtain a permit before erecting a building thereon, and prescribed certain fire limits within which no frame building shall be erected, a class of ordinances which are very common and which are never understood as intended to confer any title or license to the land upon which the improvement is to be erected. It was in perfection of the same line of legislation that the act of the legislature, establishing the Mobile River Commission, was enacted.

We think, therefore, that if we were left upon our own resources, without the benefit of authorities upon the subject, it would not be difficult to ascertain that the only purpose and effect of the act of the legislature referred to, was the protection of the navigability of the Mobile River, and that it had no purpose whatever to change or control the title to the shore, and was a police regulation intended to, and did confer no right of property or of possession upon any person; or, in other words, that the whole purpose of the act was restrictive upon the exercise of a right already existing so as to prevent any interference with commerce. Speaking of a statute very much like the present, Mr. Justice White, in the case of Morris vs. The United States, 174 U. S., 351, said: "That the preservation of navigation was the controlling object in the regulation of private wharves is very distinctly evidenced in the act of councils, approved January 8, 1831 ..... which, in sections 6 ..... enacted as follows:

"Sec. 1.—That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this corporation, who shall not first submit the plan of such wharf or wharves to the mayor, who, with a joint committee of the two boards of the City Council shall examine the same, and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall extend from the street on which they are erected."

It will be observed that this statute, which was in that case held to confer no right of property, is very similar to the statute which is the subject matter of this discussion.

Speaking of this subject in Lewis on Eminent Domain, section 84b, the author says: "The establishing of harbor lines or dock lines is simply a regulation of the private right of building piers and wharves out to navigable waters in the interest of the

public right of navigation and commerce. The establishment of such lines and the prohibiting of building piers and wharves beyond such lines is not the taking of private property."

Speaking upon the same subject in Gould on Waters, section 138, the author says: "It is competent for the state legislature to control the management and operation of wharves and piers in navigable waters, even in the hands of private persons; to establish wharves and harbor lines and to empower commissions to license structures extending to such lines. The mere establishment of the harbor or dock line does not change rights of property, nor is it an abandonment of the right of the State to control and regulate the water within the line." See authorities cited.

In the case of the Potomac Steamboat Company vs. Upper Potomac Steamboat Company, 109 U. S., 698, the court, after quoting a statute almost identical with the one which is now under discussion, proceeded to say:

"The resolutions are not, however, even a recognition of the existence of any private right of wharfing attached to the ownership of lots fronting on the north side of Water street. In point of law, they merely regulate the mode in which the right shall be exercised, whether private or public, leaving the question as to title in each case, to be judicially decided."

Speaking of a similar statute in the case of Prosser vs. Northern Pacific Railroad Company, 152 U. S., 64, the Supreme Court of the United States held that these statutes do not, in any manner, affect the title to the property or the right of wharfage, except to prescribe the manner of the exercise of the right, so as not to interfere with commerce.

In the case of Brown vs. Morris Canal Banking Company, 27 N. J. L., 648, the court construed a similar statute and pointed out that it was impossible to suppose that the legislature intended to confer upon the commissioners the power to pass upon the right of wharfage without giving them some machinery to enable them to bring the parties before it, to be

heard upon this question, not to mention the fact that the constitution guarantees a right of trial by jury upon the question of ownership.

In the case of Commonwealth vs. Alger, 7 Cush., 85, after reviewing a line of statutes similar to those which are now in question, it is held that, "The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the commonwealth, and all other persons, for navigation with ships, boats and vessels of all kinds, as a common and public right."

Potomac S. Co., vs. Upper S. Co., 109 U. S., 698.
Prosser vs. Northern Pa., 152 U. S., 64.
Jersey City vs. Amer. Dock & Imp. Co., 23 Atl, 682.
Atty. Genl. vs. Boston and S. R. R., 118 Mass., 345.
Commonwealth vs. Alger, 7 Cush., 82 et seq.
Leovy vs. U. S., 177 U. S., 629.
Altre vs. Packet Co., 21 Wall, 393.
Brown vs. C. & B. Co., 27 N. J. L., 650.
Baltimore vs. McKim, 3 Bland Chy. R., 470. (Md.)
Casey vs. Inloes, 1 Gill (Md.), 430.
Dugan et al. vs. City of Baltimore, 5 Gill & J., 351.

The case of Jersey City vs. Amer. Dock & Imp. Co., 23 Atl. Rep., (N. J.), 683, is upon all-fours with the case at bar, and the following quotation from the opinion of the court is certainly in point:

"As already shown, the title to these premises was vested in the municipality by the statute of the 4th of April, 1872; and it did not capacitate itself to take possession by the giving of its bond until the 4th of March, 1885. During the long period of time, extending through nearly thirteen years, the city neglected to execute the trust confided to it, and, on the contrary, permitted the defendant to acquire title to the property from the riparian commissioner; saw the defendant at large expense, fill up and improve the land, and subject it to the municipal taxes. It is this series of circumstances that is relied upon to operate as a 'substantial revocation by the State of the grant' in question.

"The fallacy of this proposition is apparent at a glance. How can it be held that the State has revoked this grant when the State has in no wise, either directly or indirectly, participated in the affair? The assumption that the board of riparian commissioners was the agent of the State, and, as such, conveyed the premises to the defendant is conspicuously unfounded. * * * The riparian commissioners, having no dominion over these premises, could no more convey them than they could transfer to the defendant the courthouse of the county. Nor would even the joint action of the board and the city give a semblance of legality to the transaction. If the municipal corporation had by the most formal of writings assented to the commissioners' grant, or had joined in it as a party, the instrument would have been an absolute nulity.

"This result proceeds from the characteristics of the property in question, and which has been heretofore fully defined. The title is vested in the city, in trust for the public, and is, therefore, inalienable and indisposable, except by legislative action.

"The composition of the so-called title of the defendant, it will be observed, consists of the acquiescence and neglect of the trustees of a public use, and a deed of a board having no powers over the subject, such a claim seems to me singularly futile."

The case of Eisenbach vs. Hatfield is a full discussion of the points involved in our case, and reviews the cases.

26 Pac. Rep., 539.

"The design of the State law (speaking of the Harbor Commission act) is to prohibit the encroachment by private individuals and corporations on navigable waters and to secure a uniform water front."

Yester vs. Washington Harbor Line Comrs., 146 U. S., 656.

The decision of People vs. Vanderbilt, in the 26 N. Y., 287, has been frequently cited in this controversy as upon all four with the case at bar. Indeed, the principle involved was identically the same, but the decision of that case, when properly

understood, is adverse to the contention of the plaintiff in error. It has never been doubted by us that the legislature of the State has the absolute power to establish a harbor line beyond which no wharf can be erected, irrespective of whether the title to the bed of the stream is in the government, or in a private owner. This power is not only conceded by us, but is thoroughly established by the decisions of the Supreme Court of the United States, and indeed all over the country. It rests upon the police power of the State for the protection of navigation and commerce, and is not the taking of private property, but the regulation of the use thereof, so as not to interfere with the use of the public highways. This and the further proposition that the establishment of such harbor line, does not in any manner, affect the title, or the use, of the property above the channel line, is all that is decided in the case just mentioned. The State of New York had granted to the City of New York the title to the shore and to the bed of the stream to a distance of six hundred feet from the high water mark. It had expressly prohibited the sale or disposition of the property to private individuals. In violation of this limitation, the City of New York undertook to transfer its right to Mr. Vanderbilt, and Mr. Vanderbilt built out from the shore beyond the harbor line as established by the river commissioners, under an act precisely similar to that with which we have to deal in the present case. According to the contention of the plaintiff in error the establishment of this harbor line took away from the City of New York its title to the shore and to the bed of the stream, both on the inside and on the outside of the harbor line. The court, however, decided to the contrary, and held that the effect of the establishment of the harbor line was simply to prevent the erection of a wharf beyond the harbor line, and further to revoke the previous act of the legislature conferring the right upon the city to wharf out as far as six hundred feet, to the extent, and only to the extent, of limiting that right to the harbor line. The language of the court was as follows: "No pecuniary interest is granted by

it to the city. It was passed exclusively for public purposes and simply substitutes the authorities of the city for the legislature in the accomplishment of certain public objects. It was subject, however, at any time and to any extent, to alteration or repeal Although the act of 1858 (which was the act establishing the river commission and harbor line) does not in terms restore the title to the land outside the pier line and within six hundred feet to the people of the State, yet such no doubt was its effect. That title having been transferred to the city for a specific public purpose, and that purpose having been abandoned, and its accomplishment rendered impossible by the act of 1857, the latter act must operate *pro tanto* as a repeal of that of 1821, and the title would, of course, revert to the people. It follows that the whole structure *outside the pier line*, it having been commenced after the passage of the act of 1857, was purpresture and liable to removal, irrespective of the question of whether it was a nuisance, or not."

Here we have an express finding that the effect of the establishment of the harbor line was to prohibit the city and its assigns from building a pier beyond the harbor line, but that it did not affect the title of the city to the property down to the harbor line.

The case of Miller against Mendenhall, 19 American State Reports, page 219, while apt to mislead, is of no great importance. The rule of construction of grants of land bordering upon navigable streams differs according to whether the tide ebbs and flows. Where the tide ebbs and flows, it is settled, both in Alabama and all over the Union, that the rights of the patentee are confined to high water mark. Where the tide does not ebb and flow, however, the rights vary in the different states. In some of the states, the abutting owner is confined to high water mark, and in others to the point of practical navigability. As is stated in Moller against Mendenhall, "The action of the State through the legislature in establishing the dock line is to be construed in connection with the established

doctrine of riparian rights of which we have spoken." The point decided in the case of Miller against Mendenhall as to the effect of the act of the legislature establishing dock lines is that it is an implied designation or location by the legislature of the point of practical navigability. It does not decide that this act takes from, or confers upon, the abutting owner any right which he did not already possess under common law, or under the other statutes of the State, but simply that it does establish the point of practical navigability, although it is declared by this decision, that under the rule established in Minnesota, the riparian owner takes to the point of practical navigability. In Alabama, however, where the tide does ebb and flow, it is distinctly decided that the abutting owner does not take below high water mark. It is conceded that the establishment of the harbor line does point out the point of practical navigability in the river, but we must look to the common law to say whether the plaintiff in error owns below high water mark and to the point of practical navigability, and as we have seen it has been distinctly settled in Alabama that they do not.

It may, however, be proper to observe that in Rhode Island upon the decisions of which state the case of Miller against Mendenhall is rested for authority, the rule in question is statutory, and the decisions as to the effect of these statutes, therefore throw no light upon the question.

IN REGARD TO THE MATTER OF ADVERSE POSSESSION.

The 10, 20, the 53, and from the 29 to the 51 assignments of error complain of the action of the Supreme Court of Alabama in declining to reverse the judgment of the trial court on account of its rulings, declining to permit the defendant below, now the plaintiff in error, to offer evidence tending to establish certain acts of ownership which were relied upon by the plaintiff in error to establish its adverse possession of the property in question.

It would seem to be a sufficient answer to the contention

based upon adverse possession, that it has been thoroughly settled in Alabama and in this very case, that adverse possession did not run against the City of Mobile in regard to its streets and water front.

In the case of Olive vs. State, 86 Ala., 94, it was held that there can be no proscriptive right to maintain or continue an obstruction to the navigation of a public stream.

The law upon this subject has become thoroughly settled in Alabama to be as stated by Judge Dillon in his work on Municipal Corporations, (4th ed.) Sec. 675, page 803, where it is said:

"Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within the limitation statutes and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto."

Webb vs. Demopolis, 95 Ala., 116.
Reed vs. State, 9 So. Rep., (Ala.) 163.
Olive vs. State, 86 Ala., 94.
Driggs vs. Phillips, 8 N. E., 514.
Burbank vs. Fay, 65 N. Y., 57.
Yates vs. Warrenton, 4 S. E., 818.
Smith vs. State, 23 N. J. L, 727.

When the municipal corporation acts as the representative of sovereignty, the statute of limitations cannot be invoked against it.

Marslis vs. Garrison, 27 S. W. (Texas Ct. App.) 932.

It remains only, therefore, to establish that the property in question is of a public and not a private nature.

The presumption is that all city property is of a public nature.

Curry vs. Savannah, 37 Amer. R., 74.
Mobile Trans. Co. vs. City of Mobile.

And that wharf property, when owned by a city, is of a public nature, seems to be clear.

Mobile Trans. Co. vs. City of Mobile.
Meriwether vs. Garrett, 102 U. S., 501.
Klein vs. N. O., 99 U. S., 150-1.
Hitchcock vs. Galveston Wharf Co., 50 Fed., 269.
Hart vs. Burnett, 15 Cal., 530.

Indeed the words of the grant itself declare that the property shall be held by the city as public property in trust for the public use, and that the intention of the act of 1867 was to create a public trust has already been decided. The statute of 1896, by which this property was converted into private property, is, of course, too recent to affect this question.

There is no federal question presented by these rulings whatever. The limitation upon the rule of action for the recovery of real estate is statutory, and the application of the statute of each state cannot be said to be anything more than the construction of the State statute as to which the decision of the State court is conclusive.

DuSaussure vs. Gaillard, 127 U. S., 216.

We have understood, however, that the gentlemen on the other side contend that before this property was conveyed by the State of Alabama to the City of Mobile in 1867, and while the title stood in the name of the State, the statute of limitations ran against the State, it being expressly provided by the statutes of that State that actions by the State for the recovery of real or personal property are barred in twenty years, and from this it is supposed that the defendant in error was at liberty to prove the continuous, open, notorious and exclusive adverse possession of this property for twenty years prior to the time the city became the owner of the property, the idea being that the ownership of the property had thus been vested in the plaintiff in error, or

their grantors, prior to the grant to the city. If his contention could prevail, it might show that the decision of the Supreme Court of Alabama was erroneous, but it would not establish a violation of any provision of the federal constitution, or otherwise present a federal question.

The contention, however, cannot prevail. There never has been in Alabama a statute of limitations which would run against the State in less than twenty years. This statute was first engrafted into our law as a part of the Code of 1852.

The enactment of this statute having been less than twenty years before the conveyance of the property from the State to the city, the contention that the adverse possession had ripened into a title prior to the conveyance to the city falls to the ground.

It is stated, however, that where the State holds the title only as trustee for certain individuals or a political subdivision of the State as distinguished from the State at large, and where the action is brought in the name of the State but is for the benefit of a *cestui que trust*, the action is really by the *cestui que trust*, and not by the State, and the statute of limitations of ten years is applicable. This was decided in the cases of

Miller vs. The State, 38 Ala., 600.
Burke vs. Mitchell, 87 Ala., 61.
Wyatt vs. Tisdale, 97 Ala., 594.

The doctrine has, however, never had any application where the title to the State was absolute or the trust was for the benefit of the whole people.

Lindsey vs. Miller, 6 Pet., 666.
Burgess vs. Gray, 16 How., 48.
Frisbie vs. Whitney, 9 Wal., 189.
Sparks vs. Pierce, 115 U. S., 408.
Jourdan vs. Barrett, 4 How., 169.
Gibson vs. Johnston, 92 U. S., 343.
1 Cen. Dig. Colm , 2042.
Wright vs. Porter, 6 Port., 84.
Jones vs. Walker, 47 Ala., 175.
Kennedy vs. Townsley, 16 Ala., 239.

Swann vs. Gaston, 89 Ala., 569.
Wagnon vs. Fairbanks, 105 Ala., 527.
Reed vs. Mayor, 92 Ala., 339.
Webb vs. Demopolis, 95 Ala., 116.
Hahn vs. Common Council of Dadeville, 100 Ala., 199.

It is, however, quite a sufficient answer to this proposition to say that the question was never raised either in the trial court or in the Supreme Court of Alabama. No one of the questions asked and objected to indicated upon its face that the defendant in error was undertaking to establish adverse possession of the property prior to the grant to the city, while the title stood in the name of the state, nor did the defendant in error see fit to state to the trial court his purpose, or to point out to the court what he expected to prove, and the proposition which is here argued was never advanced in the Supreme Court of Alabama. It may be remarked in conclusion, that all of the evidence which the defendant in error undertook to introduce upon the question of adverse possession would not have been sufficient to have authorized the submission of the question of adverse possession to the jury, even had the property been private in its nature, the parties in question individual citizens and every question asked, answered most favorably to the plaintiff in error.

Has the Title of the City Been Destroyed by Legislation?

The State of Alabama granted these lands to the City of Mobile in 1867, in trust for the public use. It is now insisted that the charter of the City of Mobile was annulled by the act of the General Assembly of Alabama, approved February 9, 1867, page 542, Pamphlet Acts of Alabama of 1896-1897, which is nothing more nor less than an amendment of the City Charter, and that the title to the lands in question, therefore reverted to the State. If the charter of the city had been annulled and vacated, and no successor had been created, such might be conceded to have been the effect. But it is unnecessary to consider what might have been the effect of that which did not

happen, since the act referred to did not change the identity of the corporation. This precise question has already been before the Supreme Court of the United States, as well as the Supreme Court of Alabama, and may be treated as settled.

Mobile vs. Watson, 116 U. S., 301.
Dillon on Mun. Corp., § 172.
Millers' Admr. vs. City of Pensacola, 2 Woods, 632.
Broughton vs. Pensacola, 93 U. S., 269.
O'Connor vs. Memphis, 2 Lea, 730.
Amy & Co. vs. Selma, 77 Ala., 124.
Mobile Trans. Co. vs. City of Mobile, in manuscript.

It is to be observed that the title to the property in question is held in the same manner as all of the public property of the City of Mobile, such as the streets, cemeteries, market houses, public squares, etc., and it would be anomalous indeed, if it should be held that by virtue of the act referret to, the title to all of this property reverted to its original owner by reason of this act in 1897, and that the present City of Mobile has no title to any of the public property so necessary to its existence. The contrary has been the universally accepted theory, and the present City of Mobile is today the possessor of all of its public property without any title, except such as it obtained as the successor of the old City of Mobile.

If the identity of the City of Mobile can be thus easily destroyed, so that it would cease to own the municipal properties, it would, of course, at the same time, cease to owe municipal debts, a consideration which well nigh induces us to wish that we were in error.

The question was not raised in the Supreme Court of Alabama, and is not federal in its nature.

The Contention That Ejectment is Not the Proper Remedy.

This contention merits but little consideration. That if the plaintiff has title it may recover, can hardly be questioned, and that ejectment is the proper possessory action for land, whether above or below the water, is, we think, not open to doubt.

Hoboken vs. Penn. Rr., 124 U. S., 658.
Barney vs. Keokuk, 94 U. S., 324.

In Mobile versus Eslava, 9 Porter, 577, the action was tresspass to try title.

Goodtitle vs. Kibbe, 1 Ala, 403, 9 How., 471.
Pollard vs. Greit, 8 Ala., 932.
Kennedy vs. Bebbe, 8 Ala., 909.
Hardin vs. Jordan, 140 U. S., 371.

And indeed a great number of the cases already cited were actions of ejectment for submerged lands, and it has never before been suggested, so far as we know, that the remedy was illy chosen.

Respectfully submitted,

HARRY T. SMITH,
GREGORY L. SMITH,
Attorneys for Defendant in Error.

EXHIBIT "A."

AN ACT

TO ESTABLISH A RIVER COMMISSION FOR MOBILE RIVER AND BRANCHES, AND TO DEFINE ITS POWERS, AS AMENDED BY AN ACT APPROVED FEBRUARY 28TH., 1889.

Section 1.—Be it enacted by the General Assembly of Alabama, That the Mayor of Mobile, the President of the Board of Revenue and Road Commissioners of Mobile County, or of any revenue board for said county, by whatsoever name it shall be known, if any, which shall hereafter by law succeed the said Board of Revenue and Road Commissioners, the President of the Mobile Chamber of Commerce, and their successors in office *virtute officii*, and a lawyer of not less than ten years standing at the bar of Mobile, to be appointed by the governor every four years, commencing January 1st, 1887, and a citizen of the county

of Mobile of not less than ten years residence therein, who shall not be a practicing attorney, to be appointed by the governor every four years, years ,beginning January 1st, 1889, be and the same are hereby constituted a body politic, under the name and style of "The Mobile River Commission," with the power and duty to provide a corporate seal for the authentification of all its official acts: *Provided*, that the lawyer appointed on said commission shall not be employed to prosecute or defend any suit brought by or against said commission.

Sec. 4.—Be it further enacted, that the jurisdiction of said commission shall extend over the Mobile and Tensas River, from a point one hundred yards above the head of Tensas River to a line in Mobile Bay, running east and west through the light-house at the mouth of Mobiie river, and over all tributaries and cuts off of said rivers as far up as tide water extends, including Spanish and Middle River, and including the water front of the City of Mobile; and within the said limits of the east bank of Tensas River, the west bank of Mobile River, and the east and west line near the mouth of Mobile river, and within the tide water of such tributaries, it shall be the duty of the said Mobile River Commission to establish from time to time as may appear to the said commission necessary for the protection of the navigability of said waters and the integrity of Mobile harbor and its improvements, bulk-head, wharf, dry-dock, and boom lines, and lines for similar structures, and it shall be unlawful for any person to build or maintain a bulk-head, wharf, boom, dry dock, or similar structures as the case may be, otherwise than in conformity with the lines so established, or in manner and form contrary to the regulations established by the said commission; and said commission is hereby authorized to have all or any portion of the waters embraced within its jurisdiction properly surveyed and sounded, and maps thereof made for filing in its office for its information, the expense of which

shall be charged to Mobile County, and paid as hereinafter provided.

Sec. 8.—Be it further enacted, that no one shall erect or place any bulk-head, wharf, boom, dry-dock, or similar structure in any of the waters mentioned in the fourth section of this act, without first making an application in writing to the said commission, which application shall describe the nature and exact location of such proposed structure giving specifications, and shall be accompanied by a diagram giving the exact plan thereof, as well as of the shore on both sides of the river or stream on which the same is located, for a distance of at least one hundred yards above and below the proposed structure, and when in municipal limits a distance back to the first street parallel to said river, which plan shall be drawn with India or other equally durable ink on durable drawing paper on a scale of fifty feet to the inch, and shall show the names of the riparian proprietors on both sides of the river opposite said structure where known: and said petition and map shall contain such other information as may be required by said commission and shall be sworn to: and said commission may examine on oath the applicant and such witnesses as may be produced before it for the purpose of establishing the line, and any willful false swearing shall be perjury. Said petitioner shall at the time of filing his application deposit with the City Clerk the sum of fifteen cents per foot for each lineal foot of the proposed boom, and twenty-five cents per foot for each lineal foot of wharf, bulk-head, dry-dock or similar structure, to be measured along the line of its longest dimensions: *Provided*, that when a bulk head and wharf line are sought to be established for the same wharf or structure, only one fee shall be charged, which shall be calculated on the line having the longest dimension. And said commission shall not entertain such petition until such fees are paid, but in case the application is declined and the structure is abandoned, one-half of said fee shall be returned to the applicant on filing with said commission written notice of such abandonment.

Sec. 9. Be it further enacted, that it shall be the duty of all persons, maintaining at the passage of this act, any wharf, boom, or dry-dock or similar structure in any of the waters mentioned in section four within ninety days after the first publication of notice of the passage of this act, and of the requirements of this section, in a newspaper published in Mobile, to file with the said commission for its approval an exact description and plan of such structure as prescribed in the foregoing section for future built structures, unless on application in writing said commission may by an order duly entered on its minutes extend such time in any particular case, and in case the owner or proper agent of such owner shall fail to comply with the requirements of this section, the said commission may have a survey and proper description and plan thereof made at the expense of such owner by a competent person, and the said commission shall bring an action in its own name in a court of competent jurisdiction to recover of such owner as a penalty, double the cost of such survey, description and plan, and the amount so sought to be recovered shall be a lien on the property of such owner from the commencement of such action, and when recovered shall be paid into the county treasury of Mobile County. And in case the owner of said property be not known or be a non-resident, then the proceeding may be *in rem* against said property in the nature of an attachment suit, and the said property be levied upon as in attachment suits, and notice thereof shall be given, and all other proceedings shall thereafter be had as is or may be provided by law for attachment suits against non-residents, but no attachment bond shall be required of said commission, and if said commission disapprove any such structure in whole or in part, the same shall be considered and held prima facie a nuisance to the extent of such disapproval, which action of the commission shall be duly entered on the minutes of said commission, and the owner or maintainer of said nuisance shall remove the same within thirty days after notice thereof or otherwise conform to the requirements of said commission, and in

default thereof shall be subject to the proceedings and pains and penalties mentioned in sections five and six of this act.

Sec. 10.—Be it further enacted, that upon the filing of any application for the privilege of erecting, altering, or maintaining any wharf, bulk-head, boom, or dry-dock, or other similar structure, as provided in previous sections of this act, it shall be the duty of the said commission to carefully examine the plan and specifications furnished them by the applicant, and they may take testimony as to any fact pertaining to said structure, or its effect upon the navigation of such stream, and shall; if not otherwise accurately informed, have a survey made by a competent engineer, of the place or portion of the river which it is proposed said structure shall occupy, and said engineer shall take sufficient soundings to show the depth of water along the line and within the inclosure of such bulk-head, wharf, or boom lines or within the area to be covered by such dock; and a permanent record shall be made thereof with the date of such measurement; and in case any such application is granted, it shall be the duty of such commission to have the said lines or area accurately defined by the city, or other competent engineer, by stakes or other signs for the guidance of said applicant, if desired by him, and at his expense, and when such structure is finished, survey thereof shall be had by the city or other engineer employed by such commission, who shall report to said commission, and if such structure conforms to the requirements of said commission, a certificate of such facts shall be furnished to said applicant, and a record thereof shall be made in the book of records of said commission. It shall be the duty of any such applicant to furnish free transportation to and from the location of any such structure, to said engineer and his necessary assistants acting in the performance of any duty required by this section, or to the commission, or any authorized committee thereof, if they desire to personally inspect such location or work. The said engineer shall receive for his services such compensation as may be agreed upon between the

said commission and himself, not to exceed ten dollars for each day, or fraction of a day, for his own services, and not exceeding two dollars and fifty cents per day for each assistant necessarily employed by him, to be paid by the county wherein said structure is located as hereinafter provided, and said commission may send the city or other engineer to inspect any locality, for the purpose of ascertaining whether any nuisance has been or is being erected or maintained in any navigable water within its jurisdiction and to make report thereof. And it shall be the duty of the city engineer, whenever the existence of any such nuisance shall become known to him to report the same of his own motion, and all nececessary expense authorized by such commission for the purpose aforesaid, shall be paid by the County of Mobile, as elsewhere provided in this act.

Sec. 15. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect thirty days after the date of its approval."